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**UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 DIVISION**

REGINALD BURGESS, and WILLIAM
 EVERDEN, on behalf of themselves and all
 others similarly situated and behalf of the
 general public of the United States,
 Plaintiffs,

CHRIS DOE, BOB DOE, BOB DOE2, RUTH
 DOE, ROSS DOE, and BRUCE DOE,
 Class Member Real Parties in Interest,
 v.

OTTO BOCK HEALTHCARE, US;
 ENDOLITE AMERICA a.k.a. CHAS A
 BLATCHFORD & SONS, LTD;
 OSSUR AMERICAS;
 FILLAUER GROUP;
 TRULIFE ;
 HEALTH NET INC;
 INTEGRATED HEALTH HOLDINGS INC,
 D/B/A/ WESTERN MEDICAL CENTER
 SANTA ANA;
 NORM'S RESTURANTS INC;
 EBAY INC. ;
 PAYPAL INC;
 ALIEXPRESS.COM, and;
 DOES, 1 TO 10

Defendants.

Case No.

**CLASS ACTION COMPLAINT
 For violation of:**

1. Title III of the Americans with Disabilities Act (42 USC 12181, et seq.); and by 21 USC 331(a) "Misbranding";
2. Unruh Civil Rights Act (Cal. Civ Code § 51, et seq.);
3. California Disabled Persons Act (Cal. Civ. Code §54, et seq.);
4. Breach of Contract
5. Cal. Civ. Code 1750 et seq;
6. Breach Good Faith and Fair Dealing;
7. Unfair Business Practices,
8. Intentional Interference With Contract and Prospective Economic Advantage and by Negligence;
9. Fraud
10. Specific Performance;
11. Strict Product Liability
12. Negligence

And For Injunctive Relief

JURY TRIAL DEMANDED

Honorable

Date

Time

Rm

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I. JURISDICTION

1.1 The Court has jurisdiction pursuant to 28 U.S.C. §1331 and 1343 on the grounds that this Complaint arises under Title III of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12181, et seq.,

1.2 United States Code, Title 21 Chapter 9 The Federal Food, Drug, and Cosmetic Act; and, within that code more specifically 21 CFR 890.3420

1.3 21 USC 331(a) as to the "misbranding" of a medical device.

1.4 This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332(d)(2) and (d)(6), commonly known as the "Class Action Fairness Act", or "CAFA", because there is diversity of citizenship, there are in excess of one hundred putative class members, and the claims of individual class members, in the aggregate, exceed the jurisdictional minimum of \$5,000,000.00 ("five million dollars"), exclusive of interest and costs. This Court also has diversity jurisdiction over this action pursuant to 28 U. S.C. § 1441 and has personal jurisdiction over Defendant eBay due to the fact that eBay does more than nominal business in and has sufficient "minimum contacts" with the State of California.

1.5 This Court also has diversity jurisdiction over this action pursuant to 28 U.S.C. §1441 and has personal jurisdiction over Defendant eBay due to the fact that eBay does more than nominal business in and has sufficient "minimum contacts" with the State of California.

1.6 Further, the eBay user agreement in force and effect at the time these

1 transactions and transgressions before October 9, 2012 occurred specifies
2 jurisdiction is to be in the courts of Santa Clara County California pursuant
3 to California law. eBay has since brought the same but a new agreement
4 into effect on October 10, 2012 which relocates the choice of law provision
5 for eBay to the State of Utah.

6
7 1.7 United States Code, 15 USC 7001 to 7031, also known as the Electronic
8 Signatures in Global and National Commerce Act (ESIGN) as all the
9 transactions and contracts were formed electronically and across state lines
10 between all parties concerned.

11
12 1.8 28 USC 1367, this action involves causes of action to law of state laws and
13 this court may interpret California law as there is a choice of law provision
14 in the eBay User Agreement contract declaring California law the force
15 majeure, and that defendant and PayPal is found in this District.

16 17 **II. VENUE**

18
19 2.1 28 USC 1391(b)(1) as three defendants are found in the district of this court.

20
21 2.2 Defendant eBay has a proviso of a choice of venue of this district for
22 litigation in its User Agreement contract applicable to this litigation.

23 24 **III. PARTIES**

25
26 3.1 PLAINTIFF REGINALD P. BURGESS (BURGESS) born March 5, 1956 is a
27 resident of the City of Tustin, County of Orange, California with a mailing
28 address of 630 N. Tustin Ave , #499, Orange, CA, 92867 and is a left leg trans

1 femoral amputee 57 years old and disabled. Plaintiff has started and built the
2 framework of a company, HPC Manufacturing for an invention plaintiff owns,
3 invented and has filed for a US Patent on 12/2/10 called the “flexi-socket.”
4 HPC currently has no distributors, customers or direct product line offered for
5 sale. Plaintiff Burgess trained as a prostheticist under a Certified Prostheticist.
6 Plaintiff was prescribed a prescription drug, Nuerontin, which has affected his
7 ability to think and hold control of thoughts. Plaintiff has since stopped taking
8 the drug once he discovered it was linked to these kinds permanent memory
9 injury and even suicide in litigation filed involving the drug, but it is too late,
10 the damage is done and he is one of the lucky ones to escape more serious
11 effects of the drug. Plaintiff suffers from a genetic condition of a tendency to
12 Osteofibrous Dysplasia and resultant Adamantinoma; a condition where
13 traumatized or fractured bones often will not heal properly. Osteofibrous
14 dysplasia (also known as ossifying fibroma) is a rare, normally benign non-
15 neoplastic condition with no known cause. It is considered a [genetic]
16 fibrovascular defect. Osteofibrous dysplasia (OFD) is a rare, benign, fibro-
17 osseous lesion that typically is seen within the cortex of the tibia in children.
18 Adamantinoma (AD) is a rare, low-grade malignant primary bone tumor that
19 occurs most often in the tibia and/or fibula of adolescent persons and young
20 adults; however, it has been reported in other long bones, as well.
21 Immunohistochemical and ultrastructural evidence has shown that the
22 neoplastic cell in AD derives from an epithelial lineage. More recently,
23 published reports have described another clinical entity-differentiated or OFD-
24 like AD-that appears to lie between OFD and AD along a spectrum of disease.
25 Controversy exists as to whether OFD is a precursor lesion to AD or whether
26 OFD may be a residual lesion resulting from a spontaneously regressing AD.
27 Management of OFD varies from observation to surgical intervention,
28 depending on the age of the patient and the extent of the lesion. Management

1 of AD requires surgical resection with wide margins, followed by appropriate
2 reconstruction, to minimize the risk of local recurrence or metastasis. In
3 plaintiff's case, trauma to the fibula resulted in a malignant cancerous
4 condition of aggressive squamous cell cancer which resulted in the
5 transfemoral amputation of his left leg above the knee. Plaintiff Burgess is
6 thus extremely careful not to be placed in positions or activities which might
7 traumatize or fracture his bones in any part of his body. Burgess has walked
8 in a wide variety of knee and leg combinations, and being told and believing
9 the Otto Bock C-Leg (C-Leg) was the most superior knee-leg combination on
10 the market he obtained one already set up in 2009 and mounted it on his socket.
11 The C-leg is a complete knee leg system, meaning it must use certain parts in
12 order to allegedly operate properly. From the moment he put it on and began to
13 walk in it, though it walked fine, he knew Otto Bock was selling a bill of goods
14 untrue in a very clever and manipulative marketing campaign. The C-Leg was
15 a very stiff walking leg combination because where the sensors controls for the
16 Microprocessor are located in the pylon at the foot attachment area which most
17 people would know as the "ankle" area, and thus it cannot use a shock type
18 pylon and indeed Otto Bock does not make one for the C-Leg. Typically this
19 part is known as a shock and torsion pylon, and it twists about 15 degrees right
20 or left and absorbs some impact of the heel strike like a shock absorber does on
21 a vehicle. This device makes for a very soft walk. It compensates for what is
22 called "flexion" where the human leg flexes to a slight bend as a natural
23 "shock" absorption mechanism using muscles in the calf to absorb impact and
24 body weight momentarily of each step. In a Stance and Support (SNS) type
25 knee this is mimicked by use of a hydraulic or pneumatic cylinder. The C-leg
26 is a SNS type knee. The problem is – the C-leg is not a true hydraulic knee leg
27 and it is an electrically powered hydraulic system which if it loses power – it
28 also loses support and if the amputee is depending on that resistance to be

1 there in a normal step – they will fall uncontrollably unexpectedly if it is not.
2 Otto Bock advertises if the battery gets weak the valves will close and lock up
3 the leg stiff, into a “safe mode” but that is only assuming the battery has a
4 enough power to do that – however, if the battery is older and weaker – the
5 battery will simply fail to close the valves and switch to the “safe mode”. After
6 4 years of ownership of the C-leg – and plaintiff Burgess’s was made in 2007 –
7 it was discovered the battery will weaken such to the point it may not supply
8 enough electrical power to the electric hydraulic valves, and unexpectedly
9 switch modes to “Mode 2” and all support will be gone at a moment’s notice.
10 This does not occur ever in a manual SNS leg cylinder – also known commonly
11 as the “Mauch” cylinder, and what Otto Bock has done is present the C-leg like
12 it will always behave like a Mauch cylinder when the truth is it will not if
13 loses power. What Otto Bock has done is cleverly hide this dangerous safety
14 fact under the wraps of complete in-house factory service so that the general
15 amputee and prostheticist community cannot discover this. If they did discover
16 this truth the C-leg would be considered a dangerous leg to walk on. The
17 impetus of this lawsuit is why and how plaintiff Burgess discovered this, and
18 how Otto Bock reacted under the Americans with Disabilities Act (ADA) to
19 continue to do all it could to prevent the discovery of the truth, or complying
20 with the ADA, thus forcing the filing of this action. Not only is the C-leg
21 dangerous to walk on, because of this Burgess wanted to fix it to sell it by
22 putting in a new battery, and Otto Bock’s response was to interfere by
23 insisting he service his out of warranty leg according to their warranty and send
24 it to them disassembled. Otto Bock maintains the C-leg is a prescription
25 medical device according to them and only they can service it for the “safety”
26 of the wearer. This is all a form of clever medical extortion forcing wearers to
27 pay un-necessary co-pays, be inconvenienced, and fees for services not
28 required by law, as there is no such thing as a prescription required to own or

1 service an external prosthetic. The entire external prosthetics industry wants to
 2 operate under the fallacious “prescription required” axiom so as to keep prices
 3 artificially high and exclude wearers from being able to buy, service or build
 4 prosthetics or parts for themselves personally, as well as continue to
 5 fraudulently manipulate and bill the insurance industry despite this being a
 6 violation of 21 USC 331(a) known as “mis-branding” a medical device for
 7 profit and gain, which also violates 42 USC 12182 known as “discrimination”
 8 in the ADA. See the response letter in **Exhibit A** from Ossur, which admits
 9 that the “prosthetics manufacturers” have created (made up) the “prescription”
 10 requirement by confusing 21 CFR 801.109 which applies to INTERNAL
 11 prosthetic devices that their pre-market authorization does not fall under; and
 12 Fillauer (**Exhibit B**) and Otto Bock (**Exhibit C**) which seem to believe such a
 13 prescription requirement exists but cannot cite any such reference to law as to
 14 the demand under Cal. Civ. Code 1750 etc to cease and desist their unlawful
 15 policies and business practices. Fillauer counsel goes so far as to be confused
 16 that the CFR has to change to conflict with ADA law in order for them to need
 17 to comply and halt their unlawful practices when in reality the CFR simply
 18 needs to be amended to comply with existing consumer and ADA law. .

19
 20 3.2 PLAINTIFF WILLIAM EVERDEN. is a resident of Colorado, is a C-leg
 21 wearer and wants to be able to service and build his own legs himself.

22
 23 3.3 REAL PARTY IN INTEREST CHRIS DOE. is a resident of Florida, is an
 24 unknown AK wearer and wants to be able to service and build his own legs
 25 himself, but fears appearance in litigation will result in discrimination to him.

26
 27 3.4 REAL PARTY IN INTEREST BOB DOE. is a resident of Alaska, is an
 28 Ossur Rheo Knee wearer and wants to be able to service and build his own legs

1 himself, but fears appearance in litigation will result in discrimination to him.

2
3 3.5 REAL PARTY IN INTEREST BOB DOE2. is a resident of California, is a
4 Pile' Knee wearer and wants to be able to service and build his own legs
5 himself, but fears appearance in litigation will result in discrimination to him
6

7 3.6 REAL PARTY IN INTEREST RUTH DOE. is a resident of California, and
8 wants to be able to service and build her own legs herself, but has relocated
9 and also fears appearance in litigation will result in discrimination to her.
10

11 3.7 REAL PARTY IN INTEREST ROSS DOE. is a resident of South Dakota,
12 and wants to be able to service and build his own legs himself, but has
13 relocated and fears appearance in litigation will result in discrimination to him.
14

15 3.8 REAL PARTY IN INTEREST BRUCE DOE. is a resident of California, and
16 wants to be able to service and build his own legs himself but has relocated and
17 also fears appearance in litigation will result in discrimination to him.
18

19 3.9 DEFENDANT OTTO BOCK HEALTHCARE US is part of a global company
20 that a man named Otto Bock founded as a company named Orthopädische
21 Industrie GmbH in Berlin in 1919, and today has an American Office at Two
22 Carlson Pkwy N. #100, Minneapolis MN 55447 4467 and is upon reason and
23 belief a wholly owned subsidiary of OTTO BOCK HealthCare GmbH Max-
24 Näder-Str. 15 37115 Duderstat, Germany. OTTO BOCK has created and
25 utilizes a discriminatory marketing model for its lower extremity prosthetics
26 products in that while US law does not require any kind of certified person be
27 utilized for a wearer to service their own prosthetic, OTTO BOCK will not
28 allow the owner-wearer of the product the information, software or assistance

from them to allow the wearer to service their own item. Instead insists on all sales and work be done through one of their “certified practitioners” who will charge a fee for everything and seek to bill an insurance carrier or often will not provide service if no insurance carrier is available to be billed. This increases costs and in many ways extorts payment for services not needed. In fact 21 CFR 820.198 tends to indicate it is the duty of the manufacturer of the device to communicate directly to the wearer and solve issues of the product with them. OTTO BOCK through several communications refuses to disclose the simple information on how to replace a battery in their C-Leg device and to provide the owner the software to re-program their own C-Leg. This marketing and service model violates Title III of the Americans with Disabilities Act (42 U.S.C. § 12181, et seq.). Burgess did not discover this kind of conduct from Otto Bock until beginning July 1, 2013 the conduct unraveled and not that it was considered “personal injury” under the ADA as a claim in California. Otto Bock’s position is that to allow the ADA person to service their own prosthetic property is a “safety issue” stating they will not modify their policies based on what must be the “direct threat” defense. See inter alia [Chevron U.S.A. Inc. v. Echazabal, 122 S.Ct. 2045 \(2002\)](#) and the lower court ruling at [Echazabal v. Central District of Chevron USA, Inc., 226 F.3d 1063 \(9th Cir. 2000\)](#)

3.10 BLATCHFORD INC, (Hereinafter BLATCHFORD or ENDOLITE) is a Delaware corporation doing business as a foreign corporation in Ohio under the name ENDOLITE NORTH AMERICA, with an address of 1031 Byers Road, Miamisburg, OH 45342 showing and agent for service of process as TIMOTHY N. TYE, 5975 KENTSHIRE DRIVE, DAYTON, OH 45440 operating ENDOLITE NORTH AMERICA, LTD, according OHIO Secretary of State Document 200526302908 as a merged corporation into BLATCHFORD INC. According to Endolite as found at

1 <http://www.endolite.com/news/newsEndoMove.html>; October 22nd, 2010 –
2 Endolite moved its North American Headquarters from Centerville, OH to
3 Miamisburg, OH. Endolite in the US had been located in 3 buildings separated
4 by about 100 yards each. The 21,000 square feet holds our warehouse,
5 manufacturing, assembly and administrative business units. Additionally there
6 is a large training center that will allow for customer visits and onsite training
7 by our [the] Education Department. Endolite also insists on all sales and work
8 be done through a “certified practitioners” who will charge a fee for everything
9 and seek to bill an insurance carrier or often will not provide service if no
10 insurance carrier is available to be billed. This increases costs and in many
11 ways extorts payment for services not needed. In fact 21 CFR 820.198 tends to
12 indicate it is the duty of the manufacturer of the device to communicate directly
13 to the wearer and solve issues of the product with them. This marketing and
14 service model violates Title III of the Americans with Disabilities Act (42
15 U.S.C. § 12181, et seq.). Mr. Tye responded with a question to the CLRA
16 letter, but is not a member of the California Bar, and replied no further.

17
18 3.11 Defendant Ossur Americas has its Headquarters as Ossur Americas
19 Holdings Inc, 27051 Towne Centre Drive, Foothill Ranch, CA 92610 and was
20 founded in 1971, according to its website , Össur has amassed wide-ranging
21 expertise in the development, manufacture and sale of non-invasive
22 orthopaedics. An assertive acquisition strategy has complemented ambitious
23 organic growth over the last ten years and the Company is now a leading global
24 player in the industry. Össur continues to conceive and harness the very best in
25 design and technological advances in its award-winning pursuit of “life without
26 limitations”. Recognized by the World Economic Forum as a "Technology
27 Pioneer", the Company invests significantly in research and product
28 development, and Össur’s innovative R&D unit helps ensure a consistently

strong position in the market. The business employs a staff of around 1,600 across 14 strategic locations. Össur has extensive operations in the Americas, Europe and Asia, with numerous distributors in other markets. The Company's headquarters are in Iceland. With its main Ossur Americas operations center located in southern California, Össur Americas' service network extends right across North America, from Mexico to Canada. A specialist R&D unit in California for bracing and supports is complemented by a new, state-of-the-art manufacturing center in Tijuana, Mexico. The Company is named after Össur Kristinsson, an Icelandic prosthetist who, in the early 1970's, focused on designing a better interface for prosthetic sockets. He soon discovered the ideal properties of silicone and put them to work in the form of the Icross® liner. Within a short space of time his invention was helping thousands of amputees across the world to secure their prosthesis to their limb in a more effective and comfortable way. OSSUR's response to the CLRA notice is **Exhibit A**

3.12 Defendant Fillauer Companies Inc, is located at P.O. Box 5189, 2710 Amnicola Hwy, Chattanooga, TN 37406 and was started in 1914, by George Fillauer Sr. who founded the Red Star Pharmacy, the forerunner of Fillauer. In 1934, Carlton Fillauer, CPO, expanded his father's business to establish Fillauer Orthopedic as an innovator in the orthotics and prosthetics industry. Presently, Fillauer Companies, Inc., under the leadership of Karl Fillauer as Chairman and CEO, Ken Driver as Vice Chairman and Vice CEO, Dennis Williams as President and Fran Jenkins as Vice President, is comprised of the following subsidiaries, Fillauer LLC, Hosmer, Center for Orthotics Design, Motion Control, Centri, OTS Corp, Emotis and Fillauer Orthotic and Prosthetics Patient Care. The Fillauer Companies, Inc. has grown to be a globally renowned leader in the development, manufacturing, distribution and application of orthotic and prosthetic products. Fillauer responded to the

CLRA notice stating it did not know how to answer the CLRA claims, from an attorney who was a shareholder [partner] with Chambliss, a Tennessee law firm, Stephen Burham, who is not a member of the California Bar, stating his client will not modify its policies based on the “direct threat” defense. See inter alia [Chevron U.S.A. Inc. v. Echazabal, 122 S.Ct. 2045 \(2002\)](#) and the lower court ruling at [Echazabal v. Central District of Chevron USA, Inc., 226 F.3d 1063 \(9th Cir. 2000\)](#)

3.13 Defendant Trulife has its Customer Service, Manufacturing and Distribution- Orthopaedics & Prosthetics Division at 26296 Twelve Trees Lane NW, Poulsbo, WA 98370 and is owned and managed by a group of highly professional and experienced healthcare executives since 1987. Trulife is internationally based and totally engaged in the creation, development, manufacture and marketing of niche healthcare products. The Group activities encompass Orthopaedics, Breastcare, Prosthetics and Pressurecare products and services. Trulife did not respond to the CLRA Notice.

3.14 Defendant Norm’s Restaurants according to the California Secretary of State shows the following business entity details Entity Name: NORM'S RESTAURANTS, Entity Number: C0336375, Date Filed: 04/08/1957, Status: ACTIVE, Jurisdiction: CALIFORNIA, Entity Address: 17904 LAKEWOOD BLVD, Entity City, State, Zip: BELLFLOWER CA 90706, Agent for Service of Process: PHILIP H SINGERMAN, Agent Address: 17904 LAKEWOOD BLVD, Agent City, State, Zip: BELLFLOWER, CA 90706 as of December 12, 2013, and did not respond to communications sent to them as to ADA demands of requests to address damages. In part because of the design of the C-leg, Otto Bock’s obstinacy to allowing Burgess to repair his own leg, and the then discovery of the dangerous design of the C-leg which

caused Burgess not to trust the leg any longer, combined with a smooth shiny glazed ceramic tile floor and a rubber mat placed on that as a wet floor which held the moisture, Burgess slipped and fell in a Norm's Restaurant causing damage to his residual limb, yielding the communications volley of **Exhibit I**

3.15 Defendant Health Net inc is a publicly traded company on the New York stock Exchange with a symbol "HNT" and is found in California as according to the California Secretary of State shows the following business entity details as Entity Name: HEALTH NET OF CALIFORNIA, INC. Entity Number: C0819819, Date Filed: 06/23/1977, Status: ACTIVE, Jurisdiction: CALIFORNIA, Entity Address: 21650 OXNARD STREET, ATTN: LEIGHTON FLEENOR, Entity City, State, Zip: WOODLAND HILLS CA 91367, Agent for Service of Process: CT CORPORATION SYSTEM, Agent Address: 818 W SEVENTH ST, Agent City, State, Zip: LOS ANGELES CA 90017, as of December 12, 2013; which as a pattern and practice denies ADA qualified persons – in this case amputees – the proper referral to a physician who can care for them in a setting most appropriate to their needs and did not respond to communications sent to them as to ADA demands of requests to rectify the Olmstead violations¹ of refusing to properly serve medical care in the setting most appropriate to the needs of the individual as an ADA person requesting same. A complaint letter was sent to Health Net

¹ An "Olmstead violation" is a failure to address the needs of an ADA qualified individual who seeks care in the realm of a setting most appropriate to their needs so named for the US Supreme Court ruling in *OLMSTEAD V. L. C.* (98-536) 527 U.S. 581 (1999), which has come to cover many aspects of ADA qualified individuals seeking appropriate medical care in the realm most appropriate to them as they seek same.

CEO, which was ignored and follow-up letter sent to the Agent for Service of process to which they then launched a claimed grievance investigation, but ultimate persistently ignored the request of Burgess to be seen “in the setting” [by the physician] “most appropriate to his needs” and resulted in the communications volley of **Exhibit D**.

3.16 Defendant Western Medical Center located at 1001 N Tustin Ave. Santa Ana, CA 92705 is a Health Net affiliated hospital that pursuant to 42 CFR Section 489.20, a hospital that meets the definition of a physician-owned hospital as specified in 42 CFR Section 489.3, and is a part of Integrated Healthcare Holdings, Inc., (IHHI) . IHHI is a publicly traded hospital management company that was formed in 2003. That presently owns and operates four hospitals in Orange County, California, with a total of 770 beds, 2787 employees, and 1725 active physicians. These hospitals operate approximately 12 percent of the beds in Orange County and include Western Medical Center Santa Ana, which according to the California Secretary of State shows the following business entity details as Entity Name INTEGRATED HEALTHCARE HOLDINGS, INC., Entity Number: C2711231, Date Filed: 12/16/2004, Status: ACTIVE, Jurisdiction: NEVADA, Entity Address: 1301 NORTH TUSTIN AVENUE, Entity City, State, Zip: SANTA ANA CA 92705, Agent for Service of Process: CT CORPORATION SYSTEM, Agent Address: 818 W SEVENTH ST, Agent City, State, Zip: LOS ANGELES CA 90017 as of December 12, 2013, and did not respond to communications sent to them as to ADA demands of requests to rectify the Olmstead violations of refusing to properly serve medical care in the setting most appropriate to the needs of the individual as an ADA person requesting same. IHHI operates and owns the <http://www.ihhioc.com> and <http://www.westernmedicalcenter.com> domains among others. IHHI is an

agent of Health Net and has ignored the request for X-Rays and participated in the “grievance procedure” of Health net yielding the communications volley of **Exhibit E** and **Exhibit F**. Somehow a entity called Angeles IPA is involved and apparently then approved a request to see an Orthopedic Surgeon – who is one of theirs which Burgess chose not see as a forced physician to be seen.

3.17 Defendant eBay, upon information and belief, is a Delaware corporation with the principal place of business located in San Jose, California. It is the leading provider of online consignment services using both an auction and fixed price “buy it now” format, where sellers place certain goods for sale, maintain possession of the item until it sells, and then drop ship direct to the customer upon notice from eBay the item has sold as buyers purchase them through eBay’s online bidding or “buy it now” consignment service process. Upon information and belief, Defendant eBay does business throughout the world through its website (www.ebay.com) including substantial business in the State of California and have committed tortuous acts within said State. eBay Inc. is the parent company of PayPal. eBay operates as a part of its service a “Buyer Protection Program” which leads parties to believe under the eBay User agreement the principles of California consumer protection laws will be enforced in items sold through the eBay site. eBay recently revised it’s User Agreement to be effective October 26, 2013 in such a fashion it appears to violate California law by admittedly being a California entity the person is contracting with, therein eBay seeks to use the standard and jurisdiction of the State of Utah and it’s laws in its dealings with all its User Members. eBay responded to the CLRA Notice by Ben Chapman, an associate at Cooley LLP, and a member of the California Bar, believing it had to do with Dunkel et al v eBay USDC CAND 12-cv-01452 EJD, and denied all claims or wrongdoing by eBay, reserving eBay’s “rights”. **Exhibit G**

1
2 3.18 The Plaintiffs are informed and believe and thereon allege that Defendant
3 PayPal, Inc. is a Delaware corporation doing business in the State of
4 California. PayPal's corporate headquarters are located in Santa Clara County,
5 California. Defendant PayPal, upon information and belief, was and still is a
6 corporation duly organized and existing under and by virtue of the laws of the
7 State of Delaware and has its primary place of business at 2211 N First Street,
8 San Jose, California 95131-2021. It is a wholly-owned subsidiary of eBay;
9 using eBay to continue to violate the [Comb v. PayPal](#) settlement. Defendant
10 PayPal is utilized as eBay's in-house payment transmitter. This utilization by
11 eBay makes Defendant PayPal a widely popular payment transmitter in the
12 cyber marketplace. Defendant PayPal's payment system employs the existing
13 financial infrastructure of bank accounts and credit cards, but permits
14 individuals and businesses (particularly small businesses) to send and receive
15 online payments using only PayPal as an intermediary. Upon information and
16 belief, Defendant PayPal does business throughout the world through its
17 website www.PayPal.com including more than isolated business in the State of
18 California and has committed tortuous acts within this state in violation of the
19 [Comb v. PayPal](#) settlement through eBay. PayPal did not respond directly to
20 the CLRA notice and upon reason and believe are also represented by Cooley
21 LLP also by Ben Chapman.

22
23 3.19 Defendant ALIEXPRESS.COM is an Internet vendor on reason and belief a
24 subsidiary of the "ALIBABA GROUP" of unknown origin which appears is
25 incorporated under the laws of Hong Kong with US Offices as Aliexpress.com
26 / Alibaba Group – America, 3945 Freedom Cir., Suite 600, Santa Clara, CA
27 95054, and is company involved in selling misbranded medical devices and in
28 open fraud with promises on their website they do not honor. Aliexpress was

1 sent a CLRA Notice they did not respond to. **Exhibit H**

2
3 3.20 Plaintiffs do not know the true names or capacities of the persons or
4 entities sued herein as DOES 1 to 10, inclusive, and therefore sue such
5 defendants by such fictitious names. Plaintiffs are informed and believe and
6 thereon allege that each of the DOE defendants is in some manner legally
7 responsible for the damages suffered by plaintiffs and the members of the class
8 as alleged herein. Plaintiffs will amend this complaint to set forth the true
9 names and capacities of these defendants when they have been ascertained,
10 along with appropriate charging allegations, as may be necessary, but that in
11 addition to other factors a “DOE” may any one of thousands of persons
12 occupying and all times herein relevant referred to as a Certified Prostheticist,
13 as certified by the on-line operation of <http://www.bocusa.org> or
14 <http://www.abcop.org> who by nature of the certification itself are violators of
15 Title III of the Americans with Disabilities Act (42 U.S.C. § 12181, et seq.); as
16 *Prostheticists (“a.k.a. certified practitioners”) are NOT, nor considered,*
17 *Medical professionals and no licensing or other over-sight component exists*
18 *in the State of California to regulate them – or the company which issues*
19 *them a certification. Thus a Prostheticist certification is largely a*
20 *mechanics’ “purchased” title.*

21 22 SUMMARY OF THE BASIS OF THE LITIGATION

23
24 3.21 Senator Harkin completed and published the findings of a study July 18,
25 2013 at <http://www.harkin.senate.gov/documents/pdf/OlmsteadReport.pdf> in
26 the United States Senate HEALTH, EDUCATION, LABOR, AND PENSIONS
27 COMMITTEE of which Tom Harkin, was the Chairman entitled “Separate and
28 Unequal: States Fail to Fulfill the Community Living Promise of the

Americans with Disabilities Act” in which – amputees while mentioned nowhere in it – fit every specter of the foundation of the report as to the same issues facing them as ADA qualified individual facing the same discrimination and extortion to allowing them freedom of choice to build and maintain their lives in the setting [and manner] most appropriate to their needs. **Plaintiffs ask the court to take Judicial Notice of same** per Federal Rules of Evidence 201.

3.22 According to the Harkin report, Medicaid consumers are often not given a choice of types of services and an opportunity to receive services in the most integrated setting, especially those individuals discharged from hospitals.²

3.23 In 1999 the US Supreme Court in [OLMSTEAD V. L. C. \(98-536\) 527 U.S. 581 \(1999\)](#) defined that ADA persons have the Federally Protected right of choice in their medical care so long as it is not more costly than the present cost of the care they currently receive in any care plan conceived by others.

3.24 However, this suit is not about Medicaid – it is about the freedom of choice that the Olmstead ruling hinged on that ADA qualified individuals have a right to goods and services provided to them “in the setting most appropriate to their needs” and that means they get to make the choice – not others.

3.25 “Health Plans” as those of Health Net and IHHI as operatives thereof are used to deny Olmstead rights to ADA qualified individuals forcing them to suffer decisions of the health plan in the best interests of the health plan itself.

² Charlene Harrington et al, Home and community – based services: public policies to improve access, costs, and quality (2009) available at http://www.pascenter.org/documents/PASCenter_HCBS_policy_brief.pdf.

1
2 3.26 An amputee is effectively a shut-in if they are not ambulatory and cannot
3 walk and have no safe working comfortably fitting prosthetic.

4
5 3.27 Amputees requires special medical professionals who are trained in the
6 science of amputated limbs and how the body reacts thereto

7
8 3.28 America is overrun with an ignore the law and force those wronged to pay
9 to enforce the law mentality and for that alone punitive damages should apply.

10
11 3.29 This litigation has at least six facets:

12 a. That amputees are being discriminated upon under Title III of the ADA

13 b. That vendors and manufacturers of prosthetic devices are misbranding
14 under 21 USC 331(a) as prescription medical devices to keep prices artificially
15 high and out of the reach of many amputees; when indeed they are not.

16 c. That in these items a and b above fraud is being committed.

17 d. That some amputees are suffering harm due these three things above.

18 e. That most healthcare professionals and health plans ignore the ADA
19 rights of an amputee and though inept to the knowledge of the amputee's
20 condition – shrugs them off in an Olmstead violation to deny them proper care.

21 f. That defendant Norm's Restaurants illustrates how thoughtlessness and
22 disregard for ADAAG law in construction related matters can contribute to
23 actually placing dangerous impediments in the public that can cause injury.

24
25 3.30 At the core of this litigation is [OLMSTEAD V. L. C. \(98-536\) 527 U.S. 581](#)
26 [\(1999\)](#) and though a case about mis-directing and misguiding mentally
27 retarded ADA persons, the case stands for freedom of choice for ADA
28 qualified individuals in all forms of interaction with society, and yet 23 years

1 after Olmstead, still the discriminatory attitudes exist and have even been
2 woven into the delivery and accessibility to goods and services by companies,
3 health plans and the providers thereof and even the law itself. See e.g.
4 [http://www.pbs.org/newshour/bb/government_programs/july-dec13/ada_08-](http://www.pbs.org/newshour/bb/government_programs/july-dec13/ada_08-07.html)
5 [07.html](http://www.pbs.org/newshour/bb/government_programs/july-dec13/ada_08-07.html)

6
7 3.31 By no stretch of the imagination or law is it intended that an amputee be at
8 the mercy or permission of another to find a way to walk again or sell their own
9 property, and no such limitation is found in any law.

10
11 3.32 There is no law that prohibits any amputee from owning or building any
12 such prosthetic device to do so themselves.

13
14 3.33 There is section 42 USC 12182 which prohibits others from preventing
15 disabled persons to service themselves in the manner best suited to themselves.

16
17 3.34 There is a major impediment which begins after the amputation perpetrated
18 by the healthcare industry in that they hold the reigns to the post amputation
19 scenario, and today impede the ability to gain a prosthetic in the name of costs

20
21 3.35 Losing a leg is one of the most difficult things to cope with, and every
22 amputee expects an ideal prosthesis that enables him or her to walk the same
23 way he or she did before the loss of limb, and an amputation leaves the
24 amputee in a permanent state of mental disability that matches or exceeds the
25 physical disability of the amputation dependant on how people then treat them
26 or their access to prosthetics and proper medical care as the need might arise.

27
28 3.36 The last thing an amputee should be faced with is extortion for mobility.

1
2 3.37 While an ability to walk again much like before the amputation is possible
3 at a lower cost than one might think, the modular prosthetic device
4 manufacturers and vendors have done all they can to extend the profit margin
5 by designing and promoting ever increasingly expensive devices needlessly.

6
7 3.38 An amputation is likened to a castration, because in the flash of a moment
8 one realizes they will forever be dependent on another form of assistance for
9 mobility – be it a prostheticist building a prosthetic, crutches or a wheelchair.

10
11 3.39 Many amputees cannot afford a prostheticist and their insurance does not
12 cover it – or if it does 20% of co-pay for typically a \$25,000 billing is still as
13 RUTH DOE put it – “the cost of small car” each time she visits a prostheticist.

14
15 3.40 This kind of cost need not be 75% or more as actually mark up costs
16 inclusive of labor an amputee can do themselves if they could get the parts.

17
18 3.41 According to plaintiff Burgess, it takes but one visit to a prostheticist to
19 discover how personally suffocating and condescending that entire experience
20 is, and the worst part is that one can tell they are not being told the truth, and
21 instead websites and company literature is painted with glittering generalities
22 showing amputees in usually still photos of motion like running, walking up or
23 down slopes or stairs, hiking over rocks, fishing, bicycling or carrying children
24 or groceries, when none of that is truly able to be done safely or wisely.

25
26 3.42 Then according to most amputees if one makes the mistake of asking how
27 they can get involved in their own care and maintenance or building of their
28 own prosthetic, the stonewalling begins politely, and soon one discovers the

1 amputee is not even allowed to buy their own parts or supplies direct.

2
3 3.43 Then according to most amputees if one asks advice as to what is the best
4 components to use for a prosthetic, a keen mind becomes acutely aware they
5 are seeking advice of a person who does not use the devices and only spouts
6 what the literature says, and it is not until one gets the device on and wears it
7 that one finds the limitations and tricks and issues not found in the literature.

8
9 3.44 The first hurdle is the medical community which has little clue about any
10 specialty of amputation issues, and this makes the amputee a “medical leper”
11 that no one wants to see as a patient because frankly they have no clue, and the
12 rules of medicine do not apply to things like what pain means and how to fit a
13 prosthetic limb to regain mobility especially for transfemoral amputees, which
14 is where defendants Health Net and IHHI have failed grossly.

15
16 3.45 More alarming is that an amputee cannot purchase parts to repair or build
17 their own prosthetic, and also “health plans” like defendant Health Net through
18 partner providers restrict access to proper medical care that would find a proper
19 physician addressing issues of an amputation, as they did to Burgess.

20
21 3.46 Then there are many places of public accommodation like Norm’s
22 Restaurants which lay “pretty and shiny” glazed ceramic tile floors that are
23 slippery even when dry; and the yellow rubber mats with plastic bumps now
24 laid in concrete walkways and at corners today which are slip and trip and fall
25 hazards wet or dry, that some genius thought would be helpful, but in reality
26 are dangerous. (non-glazed ceramic tile floors are not as dangerous – often red
27 6 x 6 tiles found in public restrooms, because even wet they are not slippery)

1 3.47 Norm's Restaurants put a small rubber mat on a wet glazed tile floor and it
2 was a recipe for disaster and when asked for simple accommodations and a
3 copy of the statement left with them, there was no response but their heads
4 stuck in the sand like they could not respond with any degree of humanity, later
5 their insurance carrier made contact, but then fell silent also.

6
7 3.48 There are places like Norm's Restaurants which are fairly busy with persons
8 persistently entering and exiting, the people of the general public think they
9 are helping and snatch a door from an amputee's hand to open the door wider
10 thinking they are helping, when the fact is the amputee needs to hold the door
11 to steady themselves going over the door threshold which is a trip hazard, or
12 they rush to open a door and need to be told to let go of the door and go in –
13 because the amputee needs to hold the door to steady themselves to enter,
14 where power operated doors would alleviate this “helpful” thought process.

15
16 3.49 According to Burgess he wonders often if these people think they can drive
17 a car for another in the passenger seat, so it would be a proper accommodation
18 for busy places like Norm's Restaurants to install power doors so persons in
19 wheel chairs or amputees can get in and out unfettered before installing
20 negligently dangerous things like glazed tile floors and putting down
21 unwelcome, welcome mats as trip and slip and fall hazards, if someone there
22 would just think about it – even an elderly patron could slip or trip also.

23
24 3.50 Indeed glazed ceramic tile floors violate the USDOJ ADAAG standards.

25
26 3.51 For instance – as an indication of how serious a major government entity
27 takes the limitation of an amputation, in order to gain or re-gain a US
28 Department of Transportation Commercial Drivers License one must have the

1 required physical examination done by an Orthopedic Surgeon or a Board
2 Certified Physiatrist, also known as a rehabilitation physician, as these are
3 nerve, muscle, and bone experts who treat injuries or illnesses that affect how
4 one moves to determine the medical issues as the case may be. See
5 [http://www.fmcsa.dot.gov/documents/safetyprograms/spe-certificate-](http://www.fmcsa.dot.gov/documents/safetyprograms/spe-certificate-package.pdf)
6 [package.pdf](http://www.fmcsa.dot.gov/documents/safetyprograms/spe-certificate-package.pdf)

7
8 3.52 A common general practitioner – or one staffing an emergency room – will
9 have no knowledge or training to spot the signs of an injury or abnormality to
10 an amputated residual limb, and certainly a prostheticist has absolutely no
11 relation to an amputation injury as they are not medical professionals at all, but
12 rather a common “body shop” looking to bill an insurance carrier the “max”.

13
14 3.53 The overall design of a prosthetic limb can do harm in agitating the residual
15 limb in many ways, and an amputee themselves will know the issues as they
16 live with them day in and day out – not a corporation with design engineers.

17
18 3.54 The knees of transfemoral prostheses currently in use contain a wide and
19 varied set of designs as knees – there is the SNS, which is basically a stick with
20 a hinge and hydraulic support and polycentric types often much safer but more
21 complicated to design and be built, and rotary type hydraulic knees, and the
22 most simple – a common safety knee, all mostly mis-branded as to virtues.

23
24 3.55 A prosthesis is more than just a “knee”; it is a foot and ankle system and
25 method of attachment to the residual limb all of which should be designed to
26 mimic the human body counterpart as best possible to provide the most natural
27 gait, as the foot planar and dorsi- flexes, the heel absorbs heel strike, the knee
28 flexes slightly to absorb the landing of the foot and these are things that pieces

1 of metal have never done well, but these are also things Otto Bock knew of
2 when designing the C-Leg as well as other manufacturers when designing their
3 contributions to the prosthetics market; but it is only Otto Bock that designed a
4 complete knee shin and foot system which at its very core is designed in
5 negligence and harmful to a wearer in so many scenarios Otto Bock knows of.

6
7 3.56 Such a scenario came together in this suit where poor prosthetic modular
8 part design of the C-leg, and Otto Bock's hard headed stance to allowing the
9 knee to have something as simple as a battery replacement be done by the
10 owner, that contributed to the perfect storm for a slip and fall.

11 .
12 3.57 It is imperative the court understand that the defendants, save eBay, PayPal
13 and Norm's have unlawfully made themselves a niche by preying on the
14 misfortune of amputees and they are assuring their dominance over this
15 disabled class by mis-branding under 21 USC 331(a) of prosthetic parts and
16 medical devices and the service and repair of them as "prescription required"
17 with a self appointed certification required when indeed they are not but are
18 510K exempt instead; and eBay and PayPal openly and actively continue to
19 support mis-branding; and this scenario set forth in this complaint is beyond
20 plausible and occurring.

21
22 3.58 Defendants Health Net and IHHI on the other hand in conspiracy use this
23 mis-branding as "gatekeepers" to deny ADA qualified individuals from the
24 access to goods and services in the setting most appropriate their needs as they
25 have done to Burgess and as BOB DOE2 indicated has also happened to him.

26
27 3.59 The court may take Judicial Notice of the aspect of mis-branding under 21
28 USC 331(a) as the Commissioner of the FDA has defined what constitutes it in

the commission of a violation of ADA or other laws and is not required to wait on the FDA to rule and nor is the complaint asking the court interpose the FDA duty to rule on the issues put before it in two other petitions mentioned infra, and the [FDA has summarized](#)³ some of the aspects of misbranding.

3.60 [Misbranding](#)⁴ encompasses the “accompanying” label and labeling and “is interpreted liberally to mean more than physical association with the product. It extends to posters, tags, pamphlets, circulars, booklets, brochures, instruction books, direction sheets, fillers, etc. 'Accompanying' also includes labeling that is brought together with the device after shipment or delivery for shipment in interstate commerce.

3.61 Amputees are considered without question qualified Americans with Disabilities, entitled to protections under the Americans with Disabilities Act.

3.62 Defendants have intentionally created and operate a discriminatory marketing distribution model – without any exclusion to any right under law – that is designed to prevent Amputees from being able to buy or service their prosthetic or obtain supplies and parts they need.

3.63 Defendants have created and actively support and participate in a contrived

³ See

<http://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/Overview/DeviceLabeling/GeneralDeviceLabelingRequirements/ucm052190.htm>

⁴ [Misbranding](#) definitions and clarifications of aspects encompassing are found at <http://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/Overview/DeviceLabeling/default.htm>

certification model so only “through contractual, licensing, or other arrangements, to a denial of the opportunity of the individual or class to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity”, as prohibited by 42 USC 12182(b)(1)(A)(i). Sales are only “through contractual, licensing, or other arrangements”, that defendants promote an unnecessary “certification” system which will then grant only certain individuals then called a Certified Prostheticist, as certified by an on-line operation of for example <http://www.bocusa.org> or <http://www.abcop.org> who by nature of the certification itself are violators of Title III of the Americans with Disabilities Act (42 U.S.C. § 12181, et seq.); as *Prostheticists* (“*a.k.a. certified practitioners*”) *are NOT, nor considered, Medical professionals and no licensing or other over-sight component exists in to regulate them – or the company which issues them a certification. Thus a Prostheticist certification is largely a mechanics’ “purchased” title.*

3.64 Further and most importantly, no regulation or order of the FDA has declared any EXTERNAL prosthetic part or item a regulated or controlled distribution item, and in fact instead they are considered “510K” exempt medical devices generally safe for general public distribution and are found in the areas of 21 CFR 890.3420 and 3500 along with crutches, canes and wheelchairs as medical devices for general over the counter sale. To have constructed such a discriminatory distribution model is a violation of 42 USC 12182 as to refusal to sell being a violation of the ADA, under 21 USC 331(a) “misbranding” items claiming a prescription is needed.

3.65 The current petitions before the FDA of plaintiff Burgess have to do with a 510K order and to modify 21 CFR 820.198, not misbranding.

1
2 3.66 The defendants of OTTO BOCK, ENDOLITE, OSSUR, FILLAUER, AND
3 TRULIFE operate a conspiracy to the ADA to defy the rights found at 42 USC
4 12182 in that in violation to 21 USC 331(a) these defendants have misbranded
5 their products to claim a prescription is needed, and in so much as OSSUR has
6 claimed in writing this is what they and all manufacturers have done, is a
7 conspiracy designed to keep amputees from procuring parts and supplies
8 themselves to work on their own prosthetics. (**EXHIBIT A**)

9
10 3.67 Defendants Health Net and IHHI utilize this conspiracy above to deny
11 access to goods and service as an Olmstead violation

12
13 3.68 These defendants above have designed a complete system to operate in
14 fraud to timely defraud Medicare and other insurance carriers on a regular basis
15 by declaring items need replacing on interval when indeed they do not.

16
17 3.69 This fraudulent billing occurs at approximately five year intervals when it is
18 known an insurance carrier and Medicare will pay for another completely
19 newly built prosthetic as a matter of policy without question.

20
21 3.70 Defendants Health Net and IHHI in conspiracy therewith each other – use
22 their physicians to conversely prevent an amputee from seeing a proper
23 physician as a Physiatrist or Orthopedic Surgeon to assess the physiological
24 issues of the amputation which may dictate a different prosthetic, repairs to the
25 prosthetic or even corrective surgery to the residual limb.

26
27 3.71 For instance the Otto Bock C-Leg will in five years “mis-behave” and
28 malfunction such that Otto Bock will declare it needs such extensive service it

1 would be best to replace it when indeed often it only needs a new battery.

2
3 3.72 Frankly the worst case scenario is it would need new hydraulic assembly.

4
5 3.73 By keeping these parts from the amputee themselves directly defendants
6 save Norm's, eBay and PayPal, cause to be extorted a 20% co-pay from that
7 person and bill for a new prosthetic when indeed often nothing is wrong with
8 the item, and the flip side is the amputee is left with a dangerous prosthetic that
9 they cannot even service themselves as a recipe for a public disaster.

10
11 3.74 Since the amputee can go nowhere else to obtain replacement parts, they are
12 captive under duress to pay any billing presented to them or if denied access to
13 a Physiatrist or Orthopedic Surgeon, may be left with a non-working or
14 improper prosthetic for their scenario in the name of capping health plan costs.

15
16 3.75 The more ingenious amputees turn to eBay where often items are for sale
17 that are being sold in the specter of misbranding or an inoperative state in fraud
18 to get by or repair themselves or get lucky and find one from probate estate.

19
20 3.76 This "prescription" rule around which the prosthetics defendants have built
21 this conspiratorial, discriminatory distribution model is admitted by OTTO
22 BOCK, ENDOLITE, OSSUR and FILLAUER in their policy reply letters to
23 the CLRA notices to cease and desist the discriminatory distribution practices
24 sent them all per Cal. Civ. Code 1782(a) and attached hereto. **(EXHIBIT A-C)**

25
26 3.77 Discriminatory distribution models violate the ADA at 42 USC 12182.

27
28 3.78 The common thread both Otto Bock, Ossur and Fillauer as defendants

present is a “direct threat” defense under the ADA to refuse to modify their policies to allow direct sales and service to the ADA wearer and purchaser.

3.79 When an FDA 21 CFR 820.198 complaint was filed as to Otto Bock for refusing to provide information how to change the battery in a C-Leg Otto Bock instead launched into a HIPAA violation – as plaintiff Burgess was not and never was a client of Otto Bock “healthcare”; never sought to be and did not want to be ever, thus investigating the complaint plaintiff Burgess insisting he come in to one of their “certified practitioners” and have his property disassembled and sent back to Otto Bock for service.

3.80 Everyday an amputee walks in a prosthetic device, it is a “direct threat” to their personal safety, but in this case it is fraud by misbranding and adulteration by the introduction of items in the marketplace that violate 21 USC 331(a) as hydraulic when indeed they are not hydraulic without power, and as required to be “prescribed” by a physician, when in reality there is no “prescription” but actually it is only a Detailed Work Order (DWO) – the wearer or anyone else could draft for a physician’s signature to mandate a healthcare insurer simply be required to pay for it as a medical necessity.

3.81 In the case of the C-leg and the Ossur Rheo knee both are unsafe without sufficient battery power and no instructions for use are clear of the danger of the design of these items, and the insistence for the item to be set up by and / or returned to the manufacturer for all service – even a simple battery replacement – even though it is out of warranty no one has any right to demand as said return but for the extortion for refusing service instructions, - speaks to a cover up of the reality of the actual hydraulic scenario for at the very least the Otto Bock C-leg and operates to extort funds from disabled persons not

1 required by any application of law.

2
3 3.82 Finally, at least Otto Bock, Ossur and Fillauer seem to believe an amputee
4 cannot follow the same directions for setup provided as required by law for the
5 setup for safe use of the prosthetic devices they make, which is beyond an
6 insult liken to that found in [OLMSTEAD V. L. C. \(98-536\) 527 U.S. 581](#)
7 [\(1999\)](#) which failed in 1999 against even mentality retarded ADA persons as to
8 being able to make decisions for themselves, but in this case follow simple
9 instructions as to setup – that only the amputee can FEEL and know if the item
10 is setup properly – which is EXACTLY what any “certified practitioner” would
11 be forced to ASK repeatedly of the amputee in any office visit. See CLRA
12 reply Letter of Stephen Carr from Otto Bock and Stephen Barham of the
13 Chambliss law firm representing Fillauer and Christian Robinson representing
14 Ossur Americas. **(Exhibit A-C)**

15 16 **PROSTHESIS SAFETY AND WHO KNOWS BETTER ??**

17
18 3.83 The defendants argue that a “certified prostheticist” or “certified
19 practitioner” is why their products are only sold to them because of safety
20 concerns for the ADA person being properly fitted safely, and this could not be
21 farther from the actual truth, and violate the ADA at 42 USC 12182.

22
23 3.84 Not all amputees will be able to get a DWO from a physician and being able
24 to have a prosthetic does not under law depend on this for its ownership or use.

25
26 3.85 External Prosthetic parts and items as medical devices can be used by even
27 those who only need them for short errand issues as a crutch one wears, but the
28 impetus of a DWO is a medical need to return everyday life which may never

1 be for some amputees, and some wear a prosthetic for cosmetic wishes only.

2
3 3.86 Plaintiff Burgess has a medical inability to effectively use a prosthesis
4 according to what the ambulation definition is by the Social Security
5 regulations at the [Musculoskeletal regs at 1.00B2b\(2\)](#)⁵ of being able to
6 ambulate a full city block over rough and uneven surfaces, and the C-Leg is a
7 very painful, dangerous and stiff walking prosthesis to attempt to do such a
8 thing anyway, but he uses it only for short trips into a store behind a shopping
9 cart as a walker, and has been medically declared unable to use a prosthesis,
10 but this is not how Otto Bock advertised the C-Leg system item, and made it
11 appear it might be a responsive solution for the needs of Burgess but when he
12 received one, he found this advertising and marketing to be completely untrue.

13
14 3.87 As such above, Burgess would never ask, and no physician would ask an

15
16
17 ⁵ [http://www.ssa.gov/disability/professionals/bluebook/1.00-Musculoskeletal-](http://www.ssa.gov/disability/professionals/bluebook/1.00-Musculoskeletal-Adult.htm)
18 [Adult.htm](http://www.ssa.gov/disability/professionals/bluebook/1.00-Musculoskeletal-Adult.htm) 1.00B2b(2) reads: “(2) To ambulate effectively, individuals must be
19 capable of sustaining a reasonable walking pace over a sufficient distance to be
20 able to carry out activities of daily living. They must have the ability to travel
21 without companion assistance to and from a place of employment or school.
22 Therefore, examples of ineffective ambulation include, but are not limited to, the
23 inability to walk without the use of a walker, two crutches or two canes, the
24 inability to walk a block at a reasonable pace on rough or uneven surfaces, the
25 inability to use standard public transportation, the inability to carry out routine
26 ambulatory activities, such as shopping and banking, and the inability to climb a
27 few steps at a reasonable pace with the use of a single hand rail. The ability to
28 walk independently about one's home without the use of assistive devices does
not, in and of itself, constitute effective ambulation.”

insurance carrier to pay for an item plaintiff Burgess will not and cannot medically use in the way the Social Security Administration defines to be medically able to ambulate – and Burgess further requires surgery to correct a residual stump condition, to gain a DWO Certificate of Medical Necessity as it specifies for need; however that does not mean he cannot use a leg prosthesis in the “most integrated setting appropriate to the needs of (he as) the individual.” See [Part 36.203\(a\)](#) ADA manual, US Dept of Justice.

3.88 This was not and is not the business of Otto Bock or any other party the US Supreme Court has already defined in Olmstead as what is an act that is segregationist and discriminatory to limit the daily life abilities of Burgess by arbitrary and capricious rules they have created among themselves.

3.89 The only role a prostheticist truly has today is to fabricate a socket to fit prosthetics parts to, as they “setup” a prosthetic to manufacturers’ directions

3.90 Worse yet, a prostheticist has no knowledge of how to build a proper socket for those like Burgess and in fact Burgess himself designed his own soft socket which makes the wearing and mounting of prosthetic leg parts bearable and spreads out the support evenly enough to not be excruciatingly painful; yet companies like Otto Bock think they are the be all and do all for leg amputees when in fact they have no clue what they are doing beyond seeking to make profits, designing the simplest knee at effectively the highest cost and then fraudulently selling it off to the world as some kind of magic solution to those with two good legs who really have no clue or anything to compare it to.

3.91 The Otto Bock C-leg because of how it is designed and must be constructed is one of the stiffest walking – and for Burgess the most painful - prosthetic leg

1 builds because it can have no torsion and shock adapter due the C-Leg pylon
2 positioned sensor and a very stiff foot to transfer the force of walking directly
3 without error to the sensor mounted there in the lower pylon area to control the
4 Microprocessor effects of the operation of the C-Leg.

5
6 3.92 It is not as though Otto Bock does not or did not know what a torsion and
7 shock adapter is - Otto Bock calls theirs the Delta Twist prosthetic shock
8 torsion 4R121 30; it is just that Otto Bock was negligent in failing to find a
9 way to design such an advanced item into being able to be used on the C-Leg

10
11 3.93 While it was none of Otto Bock's business, a simple request be told how to
12 replace a battery was turned into a demand that Burgess do things Otto Bock's
13 way or get no service when in fact Burgess never was Otto Bock's client, did
14 not seek to be, and never wanted to be which amounted to medical extortion.

15
16 3.94 Otto Bock launched its own investigation into Burgess as immediately
17 thereafter and daily other parties connected to the Otto Bock practitioner
18 system began to contact Burgess to try to influence him to visit them.

19
20 3.95 Worse, a prostheticist has no medical training in how to properly address
21 ailments having to do with the fit and comfort of the socket to a residual limb
22 of the amputee, and thus – especially for a weight bearing lower extremity
23 amputation, this is the major area of concern that even the prosthetic parts
24 manufacturers have no address over, and is the only true area the physician
25 might be of true assistance in ordering a certain type of socket be built – IF the
26 physician knew anything about crafting one – which indeed most all do not.

27
28 3.96 As far as a physician is concerned the best attachment of a modular

1 prosthetic device would be directly to the end of the bone – which just now is
 2 coming of age in America⁶ and is known as “Osseointegration”

3
 4 3.97 Some amputees are in such persistent pain, that no amount of a
 5 manufactured prosthetic leg system will help, but for a properly cushioned and
 6 designed socket to spread the suspension stress properly about the limb, and it
 7 needs to be one which absorbs the shock and forces in the mechanics of the
 8 prosthetic limb before – and not – actually transferring those force to the
 9 residual limb as pulling, pounding on, or twisting of the flesh of the limb

10
 11 3.98 Usually only the amputee after wearing the socket to any prosthetic device
 12 will know how and where it needs to be modified, and to prohibit the amputee
 13 from gaining access to the knowledge and materials to make these adjustments
 14 “in the setting most appropriate to their needs” is why the ADA prohibits this
 15 “segregated others know better attitude” as to disabled persons.

16
 17 3.99 Just as a person might have several shoes, one which fit better and is more
 18 comfortably than another, to force an amputee to have one limb that may not
 19 fit well at all – is barbaric, when the amputee may be able to build one better.

20
 21 3.100 In terms of safety – there are three distinct areas this would apply.

- 22 a. A properly designed, built and fitted socket attachment device.
- 23 b. A properly setup mounting of the prosthetic parts to the socket; and,
- 24 c. A properly designed prosthetic device itself.

25
 26
 27 ⁶ One Orthopedic Surgeon has been granted conditional FDA humanitarian
 28 approval to do Osseointegration surgeries using a product manufactured for such
 purpose in Australia that are more commonplace and in other parts of the world.

1
2 3.101 To focus on what this suit is about, it is item “c” above. Many above knee
3 prosthetic knees have inherit design flaws which the manufacturer masks the
4 disclosure of in its literature, and the C-Leg is the biggest offender to date
5 found, as it is inherently dangerous because it is a powered hydraulic support
6 solution, which if it always has a sufficiently strong battery, may perform as
7 advertised, but if not the wearer will suffer an uncontrollable and unexpected
8 loss of support and will fall as the device support terminates without warning,
9 and this could also happen by a radio signal placing the C-Leg into “mode 2”
10 also called “bicycle mode”; and is not a feature but a dangerous design flaw.

11
12 3.102 A certified prostheticist largely has the function of designing and building
13 the socket of item “a”; and this part is the critical piece of the prosthetic.
14 While the building of a socket is common artisan work also normally known
15 well in the entertainment field or prosthetic and special effects make-up for
16 movies and theater, most people do not know how to perform it or where to
17 obtain the materials; however as this complaint will show, the external
18 amputation prosthetic industry has gone out of its way to also treat the methods
19 of the knowledge of building sockets for amputees a secret so as to force an
20 amputee to come to the prostheticist when the truth is the prostheticist is
21 actually not needed for that part of prosthetic building either.

22
23 3.103 A certified prostheticist has nothing to do with the design of the device to be
24 mounted, but only item “b” – the setup of the device to a socket of item “a”
25 they may or may not have built. The setup of the device under “b” is done
26 according to written instructions provided by the device manufacturer.
27 ANYONE can read and follow these directions with an Allen wrench in hand.
28

3.104 Even if the prosthetic knee device is setup according to the instructions, there are adjustments needed ONLY the wearer knows of how to feel safe in walking in the device for their style of walking, and further – at least in the case of the C-leg the amount of “set back” of the knee recommended by the manufacturer is insufficient to walk safely in the knee should it fail.

3.105 As previously mentioned in the “parties” section, the C-Leg is a SNS type knee and that means it has no locking effect at heel strike and it depends on hydraulics to support the wearer in the step at heel strike and carry-over.

3.106 Hans A. Mauch is the co-inventor of the hydraulic cylinder upon which the C-leg is based, which has come to be known as the “Mauch” cylinder and “Mauch Knee” as set forth in [US Patent 2,561,370](#)⁷ from July 24, 1951, and now called simply the Stance And Support knee system – abbreviated “SNS”.

3.107 What seemed like a good idea at the time as documented in a Veterans Administration paper at <http://www.rehab.research.va.gov/jour/68/5/2/61.pdf>, does not translate into a safe product if Microprocessor controlled because the hydraulic support depends on electricity to the valves to operate safely at all.

7

<http://pdfpiw.uspto.gov/.piw?Docid=02561370&homeurl=http%3A%2F%2Fpatft.uspto.gov%2Fnetacgi%2Fnph-Parser%3FSect1%3DPTO1%2526Sect2%3DHITOFF%2526d%3DPALL%2526p%3D1%2526u%3D%25252Fnethtml%25252FPTO%25252Fsrchnum.htm%2526r%3D1%2526f%3DG%2526l%3D50%2526s1%3D2,561,370.PN.%2526OS%3DPN%2F2,561,370%2526RS%3DPN%2F2,561,370&PageNum=&Rtype=&SectionNum=&idkey=NONE&Input=View+first+page>

1
2 3.108 The loss of valve power to the hydraulics will collapse the knee completely.

3
4 3.109 This is not something Otto Bock made clear to the FDA when seeking
5 approval to market the C-Leg, and indeed instead they covered this fact up.

6
7 3.110 Other knee designs such as the Ossur Total knee family, 1900, 2000 and
8 2100 as well as even the Otto Bock 3R60 are examples of polycentric type
9 locking knee designs at heel strike, or simply standing, that will not collapse.

10
11 3.111 Many prostheticists do not like to build legs with the above knees because
12 they cannot bill the carrier for as much money in those leg builds, and to set
13 them up properly, is a manual process of both static alignment and manual
14 adjustment of the knees to get them to walk properly and comfortably; and nor
15 can they bill as wide a margin of profit in a 3R60 or Ossur Total Knee family

16
17 3.112 Prostheticists lack the feedback to get the setup done properly, and the MPC
18 knees today are forgiving to a poor setup – until it is needed if the knee fails.

19
20 3.113 For an SNS knee it is always best to set it up more to the rear – or
21 “posterior” - so it statically locks on body weight when walking to make it
22 easier on the hydraulics and in the case of failure of the hydraulics at heel
23 strike the knee will roll forward and lock rather than collapse without control

24
25 3.114 Defendant manufacturers play to the fact that to keep the prices of their
26 products artificially high to bill into the healthcare insurance industry at preset
27 rates, the product must be sold on a Doctors’ order, yet there is no law
28 prohibiting sales or possession of the prosthetic items as regulated medical

1 devices and indeed the opposite is true that the FDA considers external
2 prosthetic devices “510K exempt” devices not subject to regulation but for
3 record keeping of manufacturing supplies and customer complaints under 21
4 CFR 820.198.

5
6 3.115 Defendants Heath Net and IHHI in association with them and the need to
7 hold down an cap medical costs give a run around to the patient to effectively
8 keep a DWO from being issued for a replacement prosthetic, especially a high
9 priced Microprocessor controlled one that might be the best answer.

10
11 3.116 There have been superior polycentric Microprocessor controlled knees of a
12 better and safer design that never made it to the market to compete because of
13 this mis-branding by other companies leading many to believe something like
14 the c-leg was superior. For example one was marketed by defendant Trulife –
15 by “Seattle Systems” as a four bar knee similar to the one in the study below,
16 and was on reason and belief made by a Japanese manufacturer, Nabtesco, still
17 found at http://welfare.nabtesco.com/english/gi/in_k4/in_k4.html, is a better
18 knee. See e.g. <http://www.rehab.research.va.gov/jour/04/41/5/yokogushi.html>

19
20 3.117 Otto Bock designed a high priced prosthetic knee in 1997 to usher in a new
21 era of electro hydraulic prosthetics that were microprocessor controlled and did
22 so by designing a complete leg – knee – foot combination, which had but one
23 major flaw – in order to make it work; the hydraulics had to be fully powered,
24 and as most any hydraulics engineer will tell you, hydraulics can only be
25 controlled by closing valves when it is a non-pressure solution, and that means
26 the C-leg would only be a successful design if the valve were normally open –
27 meaning there is no hydraulic support without power to control the valves.

3.118 To cover the enormity of the this dangerous reality, Otto Bock devised an in-house maintenance and repair service and warranty operation so as to not let any parties external to Otto Bock proper come to realize the flaw of this dangerous C-Leg design or be able to service the C-leg or discover its flaws.

3.119 Otto Bock's persistent excuse is that for the safety of the wearer they allow no service or repair or leg programming be done by the owner of the knee-leg and this flies in the face of the ADA at 42 USC 12182 because the owner is then forced by Otto Bock's policies and licensing and contractual arrangement with agents to be excluded from owning their own product they just paid for.

3.120 The crux of this complaint is that by use of mis-branding by 21 USC 331(a) to claim a prosthetic item requires a "prescription" when indeed there is no such thing as a prescription for a prosthetic, the external prosthetic industry uses this adoption in a conspiracy to keep all their pricing artificially high by a refusal to sell to anyone who wants build or service their own prosthetic, and while the Commissioner of the FDA has jurisdiction to decide mis-branding cases, the FDA has also published what misbranding is thus allowing any court judicial review to decide if it is a component as a violation of any other law.

**TO UNDERSTAND THE INJURY ONE MUST UNDERSTAND THE
FLAW OF THE PRODUCT AND THE CAUSATION TO INJURY**

3.121 The human knee is NOT a simple hinge like a SNS knee is. The human knee slides backward and up when walking, and only a polycentric – typically four bar knee - closely approximates this.

3.122 Many studies have been done on the C-Leg, and all tout its virtues, but none

1 make note of its inability to service by the owner, the lack of availability of a
2 shock adapter or other feet other than those Otto Bock mandates be used, and
3 most all studies enlist the help of amputees who are told what the study is
4 expecting to “find”, and some are compensated, so all studies are thus
5 constricted as well as “seeded” to an outcome, not true of an everyday wearer.

6
7 3.123 All SNS type knees are dangerous – by their design they have no locking
8 mechanism to prevent the knee from collapsing – but the hydraulic support.

9
10 3.124 An SNS knee by its very nature as its design is also a trip hazard whereas
11 most polycentric – often called four bar knees - knees raise the foot slightly to
12 give a better ground clearance on the swing phase of a step.

13
14 3.125 For instance the Otto Bock 3R60 is a unique polycentric knee with
15 geometric locking using a 5-bar linkage mechanism. This modular knee offers
16 an EBS with a rubber bumper, which contributes to the production of a stable
17 flexion stance, and provides an automatic swing control with a hydraulic unit.

18
19 3.126 This complaint does not allege Otto Bock makes no good prosthetic
20 product, it alleges inter alia that Otto Bock computerized the wrong knee – and
21 the 3R60 would have been a better choice because for –one - the Otto Bock
22 3R60 is a unique polycentric knee with geometric locking using a 5-bar linkage
23 mechanism, and they knew this – but for the added manufacturing costs to such
24 a complicated knee, it would not have competed with the Endolite MPC SNS
25 product, and this was both fraud and product negligence given what they knew
26 of prosthetics and had in production as a product line at the time.

27
28 3.127 Here, Burgess owned and walked in a Otto Bock 3R60 for three years with

an “Amputee Solution” torsion and shock adapter with a planar and dorsi flexing College Part Tru-Step foot and never once fell, and felt safe at all times taking the next step in comfort without a tearing twisting and pounding effect jarring up his residual limb, so he knows the difference, as the C-Leg component pylon has no shock adapter and the “Luxon Max” foot has no ankle component that planar and dorsi flexes on each step, as the sensor in the c-leg would then not work properly as it has been designed by Otto Bock.

3.128 It is interesting that OTTO BOCK has taken a partial position of an “injury to self and others” defense⁸ to the ADA claim of refusal to sell, as it is they who have designed and are marketing one of the most dangerous knee-leg design combinations on the market in their C-Leg, as it is the C-Leg and through their clever and deceptive marketing campaign and warranty program; which is the leg that can and will go out from under the amputee unexpectedly at any time and has absolutely no mechanical safety feature to prevent same.

3.129 In the case of the true Mauch design SNS knee, - which the C-leg ONLY “appears” to be - at its’ core it is a mechanical hydraulic cylinder which as previously said cannot completely collapse unless all fluid somehow catastrophically escapes the cylinder, BUT in the case of the C-Leg it is an electro-mechanical hydraulic cylinder of which all it takes is the loss of power or a sensor telling programming for the restriction valve to go wide open.

3.130 This is but one manner of which the C-Leg was negligently designed, and the second is that the sensor is located in the very bottom of the pylon

⁸ In the CA Civ. Code 1750 Notice response, Otto Bock and others take a position this is why they refuse to sell direct when indeed no law exists preventing same.

1 preventing the owner from using anything but an Otto Bock pylon with the C-
2 Leg knee component in addition to the torsion and shock pylon shortcoming.

3
4 3.131 Aside from the complete design of the C-Leg being one to cover its design
5 and operating flaws with a total “in-house” service system at Otto Bock only,
6 its primary design was to build a more higher priced prosthetic leg combination
7 so as to bill into healthcare providers in a fraudulent manner when the truth is a
8 mechanical SNS Mauch style knee is safer, and the Otto Bock 3R60 is even
9 safer than that, except Otto Bock does not own the Mauch patent and has no
10 other SNS style knee but the C-leg which they completely designed.

11
12 3.132 One of the best advances in above knee prosthetic technology that has been
13 invented in recent years is the shock and torsion pylon, which as its name
14 implies absorbs shock at heel strike and twists right or left to absorb the
15 twisting forces of directional walking of turns and general left or right
16 movement and navigation, as in crowds - but the C-Leg cannot use this as it
17 would not allow the sensor to operate properly and thus the C-Leg knee would
18 not operate, and hence the C-leg would walk unpredictably.

19
20 3.133 Otto Bocks’ design response was to design and use very stiff feet so as to
21 transfer the force to the sensor reliably and this makes the C-Leg walk like a
22 sophisticated stick with a hinge.

23
24 3.134 The Endolite Smart Adaptive on the other hand actually had a knee and
25 pylon kit which included a torsion and shock pylon Endolite called the TTPro.

26
27 3.135 The Ossur Rheo Knee has no restrictions on building it with a Ceterus foot
28 that has torsion and shock built into it - it is now called the [LP Rotate with](#)

1 EVO which in the prosthetics industry is a well respected and durable shock
2 and torsion adapter foot that CANNOT be used on the C-Leg system.

3
4 3.136 Even with the very best fitting socket and / or design, the C-Leg transfers a
5 pounding and twisting effect up the leg into the residual limb to whatever
6 section of the residual limb is most susceptible to receiving it.

7
8 3.137 Amputees that have never walked in a better more comfortable leg with a
9 torsion and shock adapter or planar and dorsi flexing foot / ankle combination
10 will not know the difference and believe that feel is “normal”.

11
12 3.138 The only way this would not happen is if the amputee is an Osseointegrated
13 subject – and then it is transferred directly up the femur – preferable for sure.

14
15 3.139 This transfer into soft tissue of the residual limb can result in residual limb
16 complications ranging from sores to edemas to formation of calluses due the
17 edemas that then turn in muscles masses or scar tissue inside the residual limb,
18 as is what happened with plaintiff Burgess.

19
20 3.140 If Burgess would have been able to get a better leg he would have; but the
21 no sell policy of the prosthetics industry in general affected and prevented that.

22
23 3.141 Plaintiff Burgess began this matter simply wanting to get instructions to put
24 a new battery in the C-leg so he could sell it, but Otto Bock insisted on their
25 plan seeking he disassemble his property and send it to them at further cost to
26 him, of an item not under warranty, which was none of their business which
27 resulted in further injury and loss of prospective economic advantage.

1 3.142 One can just imagine a female under garment manufacturer who insists on
2 being there to don and remove the item each time it is used as Otto Bock seeks.

3
4 3.143 Burgess obtained the C-Leg pre-owned, and assembled; and when he
5 mounted it on his socket, it was the first time he had walked in a prosthetic
6 without a torsion and shock adapter, and thought it just took “getting used to”;
7 but instead over time swelling developed, pain increased and blisters and sores
8 had to be dealt with and finally what appears to be a permanent edema callous
9 has formed which is growing in painfulness to walk in each time he does so.

10
11 3.144 After walking in a torsion and shock pylon equipped prosthetic since 2002,
12 and having no residual limb issues like this, after the pounding a few months in
13 the C-Leg, it changed his medical condition apparently forever to the worse.

14
15 3.145 Burgess initially obtained a C-Leg in an effort to gain a commercial drivers
16 license,⁹ but the pain of using it was so great that was abandoned and he only
17 used it for quick trips into and out of shopping establishments.

18
19 3.146 A 2007 model C-Leg he obtained in to 2010 from a probate estate where the
20 first owner never used it and in fact said the same things Burgess is now
21 saying, the leg functioned fine in all other aspects, but was just hard walking.

22
23
24

⁹ An Orthopedic Surgeon or Physiatrist must perform the USDOT Physical
25 required for an amputee to gain a Commercial Drivers’ License (CDL) and only
26 the C-Leg was the knee leg combination surgeons would sign off on for pilots and
27 truckers (CDL) licenses attesting to the gravity of that limb loss is. See again e.g.
28 <http://www.fmcsa.dot.gov/documents/safetyprograms/spe-certificate-package.pdf>

1 3.147 Because amputee cannot purchase their own parts and supplies, Burgess
2 was stuck with this C-Leg and now four years later the damage and injury
3 from using it is apparently permanent and being exacerbated daily the longer
4 he is forced to keep the C-Leg because Otto Bock has devalued it refusing info.

5
6 3.148 The fall at Norm's Restaurant was so violent it must have torn capillary
7 vessels and damaged nerves, and may have cracked open the end of the bone
8 due to the "duck legged" walk which had to be maintained because it is an SNS
9 knee and for balance and to keep the leg from bending much as it could not be
10 trusted now knowing what Burgess knew of the C-Leg hydraulic issues.

11
12 3.149 Burgess reports pain is greater, the residual limb is very sensitive where the
13 callous has formed internally, and he knows now he cannot trust the hydraulics
14 of the C-leg so he is forced to walk with trepidation expecting the hydraulics to
15 fail with each step, which results in a stiffening of the back and "hip-throwing"
16 to keep the knee from bending and releasing unless he is supported by a walker
17 assist device like a grocery shopping cart or the like.

18
19 3.150 Burgess has fallen several times when the hydraulics just changed suddenly
20 and broken socket attachment screws and the mounting plate twice he reports,
21 but this time at Norm's it was a rubber mat wet underneath. **EXHIBIT I**

22
23 3.151 Now by the words and actions of Otto Bock they have known of these
24 issues Otto Bock sought to cover from the general amputee public by telling
25 misnomers about the safety features of the C-Leg that are not true as told.

26
27 3.152 Otto Bock has taken a callous position that if they do not service the C-leg it
28 cannot be serviced as though it is a leased item and refuses to release the

software to check it or program it directly by an owner after promising to do so and it contributed directly to a public slip and fall and injury at Norm's.

CLASS ACTION SUMMARY AND ALLEGATIONS

3.153 There are several real parties in interest, proof available in camera, fearful to attach their name to full on litigation as they fear retribution from health plans, physicians and prostheticists in helping to keep them walking who all would like to service and build their own prosthetic devices and legs.

3.154 Plaintiffs bring this class action against Defendants to recover damages and other relief available at law and equity on behalf of themselves as well as on behalf of the members of the following class:

A. Nationwide Class: All ADA qualified individuals as amputees involved in a transaction, or sought a direct transaction with defendants and/or who are unable to sell and/or list products on eBay's website, due decreased valuing (for want of parts or software) or suffered adverse Buyer Protection rulings prior to October 10, 2012; and who are interested in pursuing this lawsuit since 1998.

B. Nationwide Class: All PayPal, Inc. account holders whose funds have been held by PayPal or whose accounts were closed, suspended, or limited by PayPal *as a result of eBay originating actions*, or suffered adverse Buyer Protection rulings prior to October 10, 2012; and who are interested in pursuing this lawsuit since 1998.

3.155 This complaint arises from also the fact that Defendants eBay and PayPal also use an unlawful, void contract pursuant to Cal. Civ. Code . 1608, 1667,

1 1668 and 1708 as found to be a violation of public policy and void shown by
2 [Bovard v. American Horse Enterprises, Inc. \(1988\) 201 Cal.App.3d 832](#)

3
4 3.156 No defendant attempted to comply with the Civ. Code 1782 demand to
5 cease and desist and modify policy to comply with the ADA at 42 USC 12182
6 and rebuked same demand claiming a nefarious unidentified legal entitlement.

7
8 3.157 Defendants OTTO BOCK, ENDOLITE, OSSUR, FILLAUER and
9 TRULIFE are under a public policy contract created by 21 CFR 820.198 and
10 21 CFR 820.200 by the placement of their items in the healthcare market
11 regulated by Federal Law by the FDA to address service needs as requested.

12
13 3.158 As lower extremity SNS knee devices can often be easily upgraded to good
14 as new by replacing simply the cylinder there is Fraud afoot with deliberate
15 intent to cheat or deceive Medicare and insurance carriers for illegal gain.

16
17 3.159 OTTO BOCK terminates its warranty if the C-Leg changes hands or is sold,
18 and this violates the implied contract under public policy created by 21 CFR
19 820.198 and 21 CFR 820.200, as well as devalues the product over all and to
20 the extent this warranty is fraudulent to the product over time, it is void as to
21 non-transferability by 21 CFR 820.198 ad 21 CFR 820.200.

22
23 3.160 Even if OTTO BOCK may not be under any legal duty after 5 years of the
24 stated warranty, it remains under the duty of the implied contract under public
25 policy created by 21 CFR 820.198 and 21 CFR 820.200 to provide direct
26 service information and support for its products remaining in the marketplace.

27
28 3.161 This complaint also arises from the fact OTTO BOCK has created and

utilizes a discriminatory marketing model for its lower extremity prosthetics products in that while US law does not require any kind of certified person be utilized for a wearer to service their own prosthetic, OTTO BOCK will not allow the owner-wearer of the product the information, software or assistance from them to allow the wearer to service their own item and members of the class are suffering experiences through purchases through eBay which violate eBay's own policy and promises to enforce California law in their "Buyer Protection Program" and this creates a desperate class of those who have insurance to cover the added cost OTTO BOCK creates without a legitimate business reason versus those ADA persons who do not have any such insurance and further also a class of those who have C-legs that are in warranty versus those not and OTTO BOCK as well and Endolite refuse to deal direct with the disabled person who seeks not to visit a not required by law "certified practitioner", and as such boycotts and blacklists ADA buyers directly.

3.162 OTTO BOCK claims that by its status as a class II Medical Device, the C-Leg requires sales through and setup as " . . . a prescription device wherein it must be prescribed by physicians and fitted by certified prosthetists. Therefore, it is not an "over the counter item" as referenced in your letter . . ." which is simply untrue. As an "exempt 510K device" it may be sold by prescription OR over the counter, but by unfair business practices in marketing choose not to and instead isolate an ADA group keeping access from them.

3.163 OTTO BOCK, ENDOLITE, OSSUR, FILLAUER and TRULIFE support the unlawful refusal to sell axiom practiced throughout the prosthetic and prosthetics supply industry to prevent amputees as buyers – even if they do hold a "prescription"; as the "prescription" is simply a "misbranding" word for adulteration what is really a "Detailed Work Order" (DWO) as a medical

1 order to pay for a prosthetic and not for any specific person to build one.

2
3 3.164 The prosthetics field falls under a billing acronym of DMEPOS.

4
5 3.165 DMEPOS means Durable Medical Equipment Prosthetics and Orthodontic
6 Supplies, and herein “Prosthetic” shall always mean an external one.

7
8 3.166 Typically an external prosthetic item and device is expected to last at least
9 five years, but the truth is they can often last twice that span of time or more
10 depending on frequency and length of time of mechanical use of the item.

11
12 3.167 The problem this poses is one of revenue to both the manufacturer and the
13 builder of the item – today called a prostheticist; as amputees are just not found
14 in abundance and are all lined up waiting to purchase these expensive items.

15
16 3.168 OTTO BOCK, ENDOLITE, OSSUR, FILLAUER and TRULIFE and the
17 EXTERNAL prosthetics industry in general have found a way to build in
18 planned obsolescence to fraudulently bill insurance carriers, and Medicare on a
19 five year interval by declaring the item worn out, when indeed it is not; and
20 even can be repaired good as new at a fraction of the cost of a new build item.

21
22 3.169 OTTO BOCK has designed in an appearance of failure – and one such way
23 is the end of life of the lithium ion battery which it will not allow anyone but
24 themselves to replace, and this hides the true flaw of the design of the C-Leg.

25
26 3.170 When the item is sent in for repair often just barely in or out of warranty, it
27 is declared to be in need of extensive repair to coerce the building of new item.

1 3.171 For instance a new battery replacement could be done by the owner at home
2 for about \$10, but OTTO BOCK will not reveal this to the owner or will claim
3 other things more expensive to repair are wrong with the C-Leg knee item.

4
5 3.172 The true cost to fix the item might be under \$10.00, whereas the cost to
6 build a complete new prosthetic leg item would around \$70,000 for a C-leg.

7
8 3.173 For instance pre-owned C-legs from often estate sales can be found on eBay
9 for under \$3,000, but have no software to program them because OTTO BOCK
10 by claiming rights that are actually misbranding will not release it to the owner.

11
12 3.174 DMEPOS billing is done by a standardized chart with labor built in as
13 authored and revised by Medicare as to what it will pay, and this is used
14 throughout the industry. There is no "retail" sales price or competitive rates for
15 direct buy of any parts or supplies if one wanted to repair their own item.

16
17 3.175 This is what an OTTO BOCK's top repair facility technician in Germany
18 had to say on this subject when a person asked about buying a C-Leg used.

19
20 ""I have worked with otto bock quite a bit in the past and have been to their
21 main shop in Duderstadt, Germany... First these are my personal opinions; Otto
22 bock is/are perfectionists to the highest level, before a new product hits the end
23 user they go through the most rigorous testing I personally have ever seen..
24 Ossür in my opinion is the exact opposite...(i am reffering to the "power knee"
25 its just not ripe yet..)they do also have good products though... ok back to topic;
26 before a prostheticist is aloud to sell/provide a c-leg he has to go get specialy
27 "c-leg" certified etc and a whole load of stuff. The software that is for the c-leg
28 is some of the most "safe-guarded" I have ever seen. When you bring your leg

1 to checkup they can tell exactly who tinkered with it, every piece of software
 2 has its own serial number and is meant for one shop only--you sign (as a CP)
 3 contracts saying your in deep s*** if you share their software...(yes their
 4 software phones home, ask wireshark) scenario; you buy a "used" c-leg bring it
 5 to a non-c-leg-certified CP, not possible, only a CP that is c-leg-cert. has the
 6 proper software to change it, (that is legally speaking..) These are just some of
 7 bock's arguments, I think its just...making money. They insist that its quality
 8 managment...For the most part I do not agree with them. I dont know how
 9 much you intend on paying for the knee, I am sorry to say this; I would not buy
 10 it if it were over 3K and over a year and a half old... it would be horrible to pay
 11 a bunch and have it not setup properly or it break.. 9/10 c-legs that I have seen
 12 have had to be " seriously waited" on at some point.. on the other hand, I can
 13 imagine it would be wonderfull if you had one, I'm sorry, It all works down to
 14 Otto Bock making money..chris""

15
 16 December 8, 2009 (type and spelling errors reproduced in full)
 17

18 3.176 "Chris" was absolutely correct in that how OTTO BOCK flouts the
 19 requirements of 21 CFR 820.198 and 21 CFR 820.200 as to complaints and
 20 service by expiring their warranty on change of owners, and then refusing to
 21 adhere to any service requests as complaints or otherwise of that above of the
 22 actual end user because they are the ADA person and not a prostheticist.
 23

24 3.177 There is no law or license granting a prostheticist any special rights to have
 25 exclusionary marketing and distribution rights as would be declared by 21 CFR
 26 801.109 as a DMEPOS item is NOT a prescription medical device.
 27

28 3.178 ENDOLITE, OSSUR, FILLAUER and TRULIFE does the same with its

1 marketing models as does OTTO BOCK.

2
3 3.179 These are extortive marketing models that violate section 12182 of the ADA

4
5 3.180 More importantly OTTO BOCK, ENDOLITE, OSSUR, FILLAUER and
6 TRULIFE use the DMEPOS pricing and renewal time period to fraudulently
7 bill and re-build new prosthetics that only needed minor repair – if that at all –
8 and to the chagrin of the uninsured or underinsured, caused excessive costs to
9 remain high and co-pays to be paid which were higher than they ever needed to
10 be because of the exclusionary policies as to being able to buy parts and
11 supplies direct by the ADA person.

12
13 3.181 eBay and PayPal support this unlawful marketing and misbranding
14 allowing fraudulent sale of medical devices they know will not function.

15
16 3.182 When an eBay member does try to sell ADA assistive devices that are
17 lawful, eBay declares them against the medical device policy and removes
18 them from sale or will interfere in the contract of the custom device as sold.

19
20 3.183 The FDA has been petitioned to Amend the order allowing marketing of the
21 C-leg to read both “prescription” and “over the counter use” as petition number
22 FDA-2013-P-0949 and can be found through the regulations.gov website at
23 <http://www.regulations.gov/#!docketDetail;D=FDA-2013-P-0949>

24
25 3.184 Attached is FDA-2013-P-0949 (**EXHIBIT J**) and as a second petition [FDA-](#)
26 [2013-P-1080-0001](#) (**EXHIBIT K**) to address adding language to 21 CFR
27 820.198 as an “(a)(4)” section subject to the rights found in the ADA at 42
28 USC 12182.

IV. ALLEGATIONS

4.1 Schadenfreude¹⁰ is a German word which means to have joy at the misfortune of others, and that is what the prosthetics industry and OTTO BOCK and ENDOLITE operate under in discriminating against amputees under the ADA.

4.2 42 USC 12182(a) states: No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

4.3 California Civil Code 51(f) states:

(f) A violation of the right of any individual under the Americans with Disabilities Act of 1990 (Public Law 101-336) shall also constitute a violation of this section.

4.4 California Civil Code 51.5 states in part:

51.5. (a) **No business establishment of any kind whatsoever shall discriminate against**, boycott or blacklist, or refuse to buy from, contract with, **sell to**, or trade with any person in this state on account of any characteristic listed or defined in subdivision (b) or (e) of Section 51, or . . . because the person is associated with a person

¹⁰ <http://en.wikipedia.org/wiki/Schadenfreude> see also *The Joy of Pain: Schadenfreude and the Dark Side of Human Nature*, Oxford University Press, Publication Date: July 31, 2013 ISBN-13: 978-0199734542

1 who has, or is perceived to have, any of those characteristics.

2 (b) As used in this section, "**person**" **includes any person, . . .**
 3 **or company.**

4
 5 4.5 What constitutes "discrimination" is defined in the Americans with
 6 Disabilities Act, and plaintiff(s) is/are injured in fact due the policies of all
 7 defendants save eBay and PayPal refuse simple service information on field
 8 replaceable items like batteries and cylinders that can be installed by anyone
 9 and / or to repair and ship the good as contracted for and agreed directly.

10
 11 4.6 For instance a complete replacement hydraulic unit for the ENDOLITE Smart
 12 Adaptive knee – including the microprocessor is only \$2,500 to purchase to
 13 replace by literally removing two bolts, and that is a far cry from the entire
 14 knee cost wholesale of \$18,000 to \$20,000 dollars, but results in a new knee,
 15 and this price is the cost without labor the prostheticist will ICD9 code to bill
 16 out at typically \$28,000 to \$30,000 without a foot, and \$39,000 with a foot.

17
 18 4.7 Schadenfreude is thus a violation of the ADA when surfacing for profit.

19
 20 4.8 OTTO BOCK, ENDOLITE, OSSUR, FILLAUER and TRULIFE are all aware
 21 that to refuse to sell to the person who uses the item OR any person who wants
 22 the item is unlawful because it interferes with a prospective economic
 23 advantage through the use of and creation of an unlawful distribution model of
 24 an Americans with Disabilities Act specific product that enjoys no legal
 25 distribution monopoly due a licensed or restricted distribution system without
 26 legitimate business reasons for doing so particularly when the manufacturer –
 27 the defendants in this case – do sell direct into their unlawful distribution
 28 marketing model using a certification scheme bound to no law or set of laws as

to legitimate licensing requirements.

**AN EXTERNAL PROSTHETIC AND PARTS COMPRISING IT ARE
BY DEFINITION NOT PRESCRIPTION MEDICAL DEVICES**

4.9 The FDA administers the Food Drug and Cosmetics Act of 1938 (FD&C)

4.10 On May 28, 1976, the FD&C Act was amended to include regulation for [medical devices](#). The amendment required that all medical devices be classified into one of three classes:

- Class I: Devices that do not require premarket approval or clearance but must follow general controls. An external prosthetic can be a class I device.
- Class II: Devices that are cleared using the 510(k) process. Diagnostic tests, cardiac catheters, hearing aids, and amalgam alloys used to fill cavities are examples of class II devices. An external prosthetic can be class II devices.
- Class III: Devices that are approved by the Premarket Approval (PMA) process, analogous to a [New Drug Application](#). These tend to be devices that are permanently implanted into a human body or may be necessary to sustain life. An [artificial heart](#) meets both criteria. The most commonly recognized class III device is an [Automated External Defibrillator](#). Devices that do not meet either criterion are generally cleared as class II devices. An external prosthetic is never considered a class III device unless it would be part of an Osseointegration system which the FDA has never in this country approved for use in conjunction with an external prosthetic part yet.¹¹

4.11 If a product is labeled, promoted or used in a manner that meets the following definition in section 201(h) of the Federal Food Drug & Cosmetic (FD&C) Act it will be regulated by the [Food and Drug Administration \(FDA\)](#)

¹¹ <http://www.rehab.research.va.gov/jour/09/46/3/pdf/hagberg.pdf>

as a medical device and is subject to premarketing and postmarketing regulatory controls. A device is:

- "an instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article, including a component part, or accessory which is:
 - recognized in the official National Formulary, or the United States Pharmacopoeia, or any supplement to them,
 - intended for use in the diagnosis of disease or other conditions, or in the cure, mitigation, treatment, or prevention of disease, in man or other animals, or
 - intended to affect the structure or any function of the body of man or other animals, and which does not achieve its primary intended purposes through chemical action within or on the body of man or other animals and which is not dependent upon being metabolized for the achievement of any of its primary intended purposes."¹²

4.12 An external prosthetic device or part might be considered “intended to affect the structure or any function of the body of man” but the legal reality is it does not – it replaces an amputated part of the body, and thus is in a gray area

4.13 In the FD&C is a section known as “510(k)” which pivots on an exemption from or no thus regulation under the FD&C. There is no 510(k) form, however, [21 CFR 807](#) Subpart E describes requirements for a 510(k) submission. Before marketing a device, each submitter must receive an order,

¹² From

<http://www.fda.gov/medicaldevices/deviceregulationandguidance/overview/classifyyourdevice/ucm051512.htm>

in the form of a letter, from FDA which finds the device to be substantially equivalent (SE) and states that the device can be marketed in the U.S. This order "clears" the device for commercial distribution.¹³

4.14 510(k) exempt medical devices are Medical devices that do not require FDA review before the devices are marketed are considered "510(k) exempt." **These medical devices are mostly low-risk**, Class I devices and some Class II devices that have been determined not to require a 510(k) (named for a section in the Food, Drug, and Cosmetic Act) to provide a reasonable assurance of safety and effectiveness. These devices are exempt from complying with premarket notification requirements subject to the limitations on exemptions; however, they are not exempt from certain general controls. For example, 510(k) exempt devices must

- be suitable for their intended use
- be adequately packaged and properly labeled
- have establishment registration and device listing forms on file with FDA
- be manufactured under a quality system (with the exception of a small number of class I devices that are subject only to complaint files and general recordkeeping requirements)¹⁴

4.15 In granting certification of a restricted prosthetic medical device, the FDA makes clear that is how the approval of the item to market is granted as thus:

¹³ From <http://www.fda.gov/medicaldevices/deviceregulationandguidance/howtomarketyourdevice/premarketsubmissions/premarketnotification510k/default.htm>

¹⁴ From <http://www.fda.gov/AboutFDA/Transparency/Basics/ucm194468.htm>

For instance the language found in the Novation Hip system at http://www.accessdata.fda.gov/cdrh_docs/pdf5/p050039a.pdf reads:

“The sale, distribution, and use of this device are restricted to prescription use in accordance with 21 CFR 801.109 within the meaning of section 520(e) of the Federal Food, Drug, and Cosmetic Act (the act) under the authority, of section 515(d)(1)(B)(ii) of the act. FDA has also determined that, to ensure the safe and effective use of the device, the device is further restricted within the meaning of section 520(e) Under the authority of section 515(d)(1)(B)(ii), (I) insofar as the labeling specify the requirements that apply to the training of practitioners who may use the device as approved in this order and (2). insofar as the sale, distribution, and use must not violate sections 502(q) and (r) of the act.” [emphasis added]

Similarly another approval to market an internal prosthetic at http://www.accessdata.fda.gov/cdrh_docs/pdf9/p090002a.pdf for the Pinnacle CoMplete Acetabular Hip System also states as below

“The sale and distribution of this device are restricted to prescription use in accordance with 21 CFR 801.109 and under section 515(d)(1)(B)(ii) of the Federal Food, Drug, and Cosmetic Act (the act). FDA has determined that this restriction on sale and distribution is necessary to provide reasonable assurance of the safety and effectiveness of the device. Your device is therefore a restricted device subject to the requirements in sections 502(q) and (r) of the act, in addition to the many other FDA requirements governing the manufacture, distribution, and marketing of devices.” [emphasis added]

4.16 These two above devices are examples of INTERNAL surgically implanted installed prosthetics which are regulated by the FDA under the FD&C act and can only be ordered and implanted by a licensed physician.

4.17 The OTTO BOCK C-leg is an EXTERNAL prosthetic medical device which bolts onto a skin contact support socket system and has an authorization to market found at http://www.accessdata.fda.gov/cdrh_docs/pdf/k991590.pdf

1 which simply says:

2
3 We have reviewed your Section 510(k) notification of intent to
4 market the device referenced above and we have determined the
5 device is substantially equivalent (for the indications for use stated in
6 the enclosure) to devices marketed in interstate commerce prior to
7 May 28, 1976, the enactment date of the Medical Device
8 Amendments, or to devices that have been reclassified in accordance
9 with the provisions of the Federal Food, Drug, and Cosmetic Act
10 (Act). You may, therefore, market the device, subject to the general
11 controls provisions of the Act. The general controls provisions of the
12 Act include requirements for annual registration, listing of devices,
13 good manufacturing practice, labeling, and prohibitions against
14 misbranding and adulteration.

15 4.18 This above is as the same for all EXTERNAL PROSTHETIC devices.

16 4.19 There was no restriction requirement to a prescription prior to 1976, and
17 there is none now, as it is a discriminatory marketing ploy to use the impetus
18 language of the INTERNAL PROSTHETIC, to keep prices artificially high and
19 marketing discriminatory to use insurance carriers to pay higher costs.

20 4.20 Defendants OTTO BOCK, ENDOLITE, OSSUR, FILLAUER and
21 TRULIFE are all aware what they call a “prescription” is actually nothing
22 more than a “Detailed Work Order” – called a “DWO” used for the purpose to
23 bill a healthcare insurance carrier and it has nothing to do with the “obvious” –
24 an amputee needs a replacement limb or device to regain use of that part of the
25 body, to which OSSUR has published proof of this in their Ossur
26 Reimbursement Guide at page 6 of 12 also found on the Internet at
27 <http://www.ossur.com/lisalib/getfile.aspx?itemid=31138>, and attached hereto
28 as **Exhibit L** where it is clearly written “Under established Medicare policy,
“[s]omeone other than the physician [i.e., the prosthetist] may complete the

DWO. However, the treating physician must review the DWO and personally sign and date the order to indicate agreement.”, yet while not a “prescription” at all, this axiom is used to deny the sale of parts and other supplies so only those in the closed distribution loop may buy to re-sell items at inflated prices

4.21 Even Medicare does not use the term “prescription” it calls what the prosthetic manufacturers want to call a “prescription” - is a “certificate of medical necessity” in their Medicare Part B brochure [CMS Publication Number 11045](#), and as such the defendants are all participating in and causing a “misbranding” in their sales literature and distribution mechanisms which rely on this adulterated misnomer, thus violating the ADA provisions in their refusal to sell direct when requested, as Medicare has a Form [CMS-854](#)¹⁵; HOWEVER, that form above is only part “C” – what is called the “Detailed Work Order” (DWO) portion and “D” which is the physician’s attestation and agreement to the build order as proposed by the supplier OR wearer desires.

4.22 Part A contains the CERTIFICATION TYPE/DATE:, PATIENT INFORMATION:, SUPPLIER INFORMATION:, PLACE OF SERVICE: FACILITY NAME: HCPCS CODES:, PATIENT DOB, HEIGHT, WEIGHT AND SEX:, PHYSICIAN NAME, ADDRESS:, UP IN:, and the PHYSICIANS TELEPHONE NO: and Part B contains the EST. LENGTH OF NEED:, DIAGNOSIS CODES:, a QUESTION SECTION:, NAME OF PERSON ANSWERING SECTION B QUESTIONS:, and today this component portion may be freehand, but is normally incorporated into the Medicare Billing DMEPOS software and the instructions state at Section B, “(May not be completed by the supplier. While this section may be completed by a non-

¹⁵ <http://www.cms.gov/Medicare/CMS-Forms/CMS-Forms/Downloads/CMS854.pdf>

1 physician clinician, or a physician employee, it must be reviewed, and the
 2 CMN signed (in Section D) by the ordering physician.)” and collectively is
 3 why defendants want to call this process a “prescription”, but it is not, what it
 4 is – is simply and order of medical necessity for the parts billed for to be paid
 5 for by the insurer and all Healthcare Insurers follow this same procedure.

6
 7 4.23 No regulatory law exists preventing a wearer purchasing their own parts.

8
 9 4.24 Otto Bock’s C-Leg (and new updated version the Genium) and Endolites’
 10 Smart Adaptive (and new updated version the Orion) are manufactured with
 11 default setup settings that make the knee safe out of the box when installed
 12 according to simple bolt on alignment instructions that they even must provide
 13 to their / a prostheticist.

14
 15 4.25 Where the confusion over a “prescription” emanates is that in order to bill
 16 an insurance carrier, the prostheticist artisan must have a doctors’ order – a.k.a
 17 a “prescription” - the “DWO” CMS-854 drafted by the prostheticist and signed
 18 onto by a physician who really has no idea what is actually needed – nor what
 19 was signed, - for the healthcare providers to pay for such an item, but there is
 20 no requirement by law preventing one from selling, purchasing, owning or
 21 building their own prosthetic or in many states for others to do as a business.

22
 23 4.26 For instance other prosthetic knee manufacturers will sell direct, as indeed
 24 there is no “prescription” required to own a prosthetic knee and the company
 25 <http://k12prosthetics.com>, at <http://k12prosthetics.com/faq.htm> says so. The
 26 company makes less expensive knees using bicycle shock parts that have been
 27 shown to work extremely well. See <http://k12prosthetics.com/products.htm>
 28

1 4.27 OTTO BOCK has taken this one step above to a higher level of
 2 Schadenfreude to do all things in-house secretly and through its network of
 3 certified practitioners it controls by and through loss of certification threats and
 4 termination of software use and upgrades to eliminate them if need be while the
 5 uninsured user cannot get a C-leg at all or service their own C-leg.

6
 7 4.28 This marketing and distribution model forces a costly symbiotic and
 8 discriminatory relationship with defendants because they have designed their
 9 products to be coercive and extortive by manufacture and in distribution as
 10 nothing prevents the wearer from purchasing their own parts, building their
 11 own leg and billing for re-imburement upon the physicians attestation.

12
 13 **A CLOSED DISTRIBUTION MODEL THUS VIOLATES THE ADA**

14
 15 4.29 Unlawful is this practice so says the US Supreme Court in OLMSTEAD V.
 16 L. C. (98-536) 527 U.S. 581 (1999) which is the landmark decision that in so
 17 many bluntly worded ways reads to be disabled - even a mental disability -
 18 does not equate to being stupid forced by others in life to their wishes.

19
 20 4.30 There is a Healthcare crisis in America and this action illustrates the
 21 convenience of how perpetrators in the Prosthetics Industry use fraud and their
 22 entitlements as providers & suppliers, with violations of law to run up costs.

23
 24 4.31 Between 1988 and 1996, there was an average of 133,735 hospital
 25 discharges for amputation per year.¹⁶ In the United States, there are

26
 27 ¹⁶ Timothy R. Dillingham, MD, et al, "Limb Amputation and Limb Deficiency:
 28 Epidemiology and Recent Trends in the United States," Southern Medical Journal
 95 (2002): 875-83.

approximately 1.7 million people living with limb loss.¹⁷ It is estimated that one out of every 200 people in the U.S. has had an amputation.¹⁸ Lower-limb amputations accounted for 97 percent of all dysvascular limb loss discharges with 25.8 percent at above-knee level, 27.6 percent at below-knee level, and 42.8 percent involving numerous other levels.¹⁹

4.32 Now in 2012 there were actually about [185,000 amputations per year](#).²⁰

4.33 An amputation surgery DOES NOT include a replacement prosthesis unless the patient has insurance which covers it, AND even then, because the prosthetic is simply akin to a “crutch” one wears – that anyone can literally make; if the patient DOES NOT have insurance which COVERS the prosthetic, they then find they cannot even BUY the parts themselves to build one themselves, and this is in violation of existing law to prohibit such purchase.

4.34 An amputation surgery COULD have a component part of a titanium attachment stud installed in the end of the bone instead of bone wax, which then would eliminate the need for the prostheticist completely, and the lower extremity external medical device would then attach directly to the bone extension stud protruding end of the residual limb. This is a surgical process known as Osseointegration and has been known in the world of prosthetics

¹⁷ Kathryn Ziegler-Graham, PhD, et al. “Estimating the Prevalence of Limb Loss in the United States - 2005 to 2050,” Archives of Physical Medicine and Rehabilitation 89 (2008): 422-429.

¹⁸ Patricia F. Adams, et al, “Current Estimates from the National Health Interview Survey, 1996,” Vital and Health Statistics 10:200 (1999).

¹⁹ http://www.amputee-coalition.org/fact_sheets/amp_stats_cause.html

²⁰ <http://www.amputee-coalition.org/limb-loss-resource-center/resources-by-topic/limb-loss-statistics/limb-loss-statistics/index.html>

1 since 1950 when Dr. Per-Ingvar Brånemark of Sweden discovered the bonding
2 properties of Titanium to bone and is now carried on by his son Rickard
3 Brånemark who has done hundreds of Osseointegration surgeries and others
4 around the world have learned the technique, and a pioneer here in American is
5 Dr. Ronald Hillock of Las Vegas having done the first such surgery here in
6 American sanctioned by the FDA as a trial.

7
8 4.35 The Prosthetics Industry operates as a quasi-medical component to the
9 Healthcare Insurance Industry. It is the mechanical manufacture of artificial
10 limbs and body components mostly now found regulated under Section 510(k)
11 of the Food, Drug and Cosmetic Act, also more fully known as TITLE 21
12 CHAPTER 9 the FEDERAL FOOD, DRUG, AND COSMETIC ACT; and, in
13 that field prosthetic items are divided into two classes one being exempt, [See
14 21 CFR 890.3420 and 3500] not requiring a prescription as EXTERNAL
15 devices, and INTERNAL devices which are surgically implanted requiring a
16 prescription and are regulated as to manufacture materials and ability to
17 distribute; *and this instant action concerns ONLY EXTERNAL devices.*

18
19 4.36 An *external* prosthetic can be anything from a stick to a limb prosthetic
20 one wears – but no prescription is required to own, buy or wear one; however
21 the Healthcare Insurance Industry (HII) has adopted a policy that collectively it
22 will not pay for any such prosthetic device unless it is ordered by a licensed
23 physician in the course of their professional and medical employment and
24 opinion it is needed to restore body function or address a return quality of life.

25
26 4.37 How it is not intuitively obvious even the most casual observer that a person
27 with a limb amputation needs a restorative prosthetic is an oxymoron.
28

1 4.38 Because anyone can bolt together and build a prosthetic assistance device,
2 the prosthetics manufacturing industry of which all defendants save eBay and
3 PayPal are component members have adopted a position which is counter to
4 the ruling of the US Supreme Court in *OLMSTEAD V. L. C.* (98-536) 527 U.S.
5 581 (1999) 138 F.3d 893, affirmed in part, vacated in part, and remanded as
6 ruled under the Americans with Disabilities Act in which they seek to keep
7 away these components under the “anti-discrimination” provision of the ADA
8 Act from the amputees that need them unlawfully.

9
10 4.39 Because the prosthetics industry through its “purchased certification”
11 process and “prohibited purchase” process has created under what the industry
12 erroneously believes is an FDA regulation entitlement on the matter, it seeks to
13 discriminatorily keep away items, parts and repairs from Disabled Americans,
14 the true “customers” who need to have and wear the manufactured prosthetics.

15
16 4.40 The manufacturer defendants save eBay and PayPal, in this case use the
17 insulator of a “certified practitioner” prostheticist to extort fees to bill for and
18 keep complaints and actions for product they know does not perform as
19 intimated to keep product liability from attaching usually directly to them, as
20 complaints land with the prostheticist and the prostheticist then blames the
21 manufacturer who the patient (amputee) as customer cannot reach, and under
22 the same axiom refuses to divulge simple service information to the end user
23 upon complaint also few wearers know how to or find time to, make an FDA
24 complaint to the FDA [Medwatch](https://www.accessdata.fda.gov/scripts/medwatch/) program and website²¹

25
26 4.41 In this bravado cited above, the defendants suborn and encourage billing
27

28 ²¹ <https://www.accessdata.fda.gov/scripts/medwatch/>

1 and building fraud and increased prices as illustrated by this action at bar, and
2 to most of these defendants – all of whom are largely staffed by persons with
3 two good legs – cannot understand what the amputee is complaining about – it
4 is just fine from their perspective of getting up every morning and walking
5 normally - in essence unqualified to work in the field at all. They have no clue,
6 and that is why the Americans with Disabilities Act is there.

7
8 4.42 In an example of how damages can occur, plaintiff BURGESS had arranged
9 to sell his old knee to a prostheticist after sending it out for repair and upgrade
10 to ENDOLITE, but the prostheticist a non-party J. Daniel NUNEZ attempted
11 to re-direct the package using defendant ENDOLITE, not belonging to him, to
12 his facility when he had first agreed to pay for it and then when instructions
13 were sent to ship it there, reneged on the agreement and duty to pay for it.

14
15 4.43 Had Endolite not Interfered with the Prospective Economic Advantage and
16 completed the arranged repair with Burgess, this would not have happened

17
18 4.44 ENDOLITE's policy found nowhere in the law - even though the buyer
19 BURGESS through his company , HPC, was a fully qualified buyer – even by
20 their own terms – is to use a “magical” non-existent medical industry policy
21 based on non-existent FDA law to refuse to sell – even when they have sent a
22 quote and agreed to do initially.

23
24 4.45 Thus a convenient prostheticist – distributor or direct manufacturer
25 unlawful sales bar is a clever way fraud operates here to keep the truth about
26 malfunctioning or deficiently designed and fraudulently promoted prosthetic
27 items to continue to exist in the market and be sold and not retro-fitted.

1 4.46 For OTTO BOCK, ENDOLITE, OSSUR, FILLAUER, or TRULIFE, and
 2 OTTO BOCK especially; this results in an intentional devaluating of the
 3 product in resale that would result in a further sale of a new item instead
 4

5 4.47 Though the revised Social Security Musculoskeletal regs at 1.00 J3 speak to
 6 a Medical Professional reviewing the build of prosthetics for fit and function,
 7 which dovetails the CMS-854; almost never does this occur, and when it does,
 8 still an amputee cannot always be assured the prostheticist will heed the
 9 guidelines (or the Law if it is Medicare-Medicaid billing) to specify and build
 10 a compliant prosthetic that is comfortable and also performs as 1.00 J3 dictates.
 11

12 4.48 Here, there are actual witnesses and empirical evidence as to carnal
 13 knowledge to the acts and work performed, dates and times, and emails sent
 14 using a time and date stamping service to show by a clear preponderance of the
 15 evidence a formed agreement occurred and subsequent work performed; or
 16 should have occurred as law requires, exactly as plaintiff alleges herein and
 17 that *damages have occurred* and are occurring in the breach by ENDOLITE.
 18

19 4.49 “Certified Practitioners” are thus the “brick and mortar” business-end of an
 20 immoral discriminatory and exclusionary ADA sales and marketing model.
 21

22 4.50 The actions of defendants, save eBay and PayPal are discriminatory by 42
 23 USC 12182 preventing an amputee from the goods and services of an item.
 24

25 4.51 The actions of both defendants OTTO BOCK and ENDOLITE constitute
 26 FRAUD, and INTERFERENCE WITH PROSPECTIVE ECONOMIC
 27 ADVANTAGE and both should be made to SPECIFICALLY PERFORM and
 28 injunctive relief be provided to halt this discriminatory sales and marketing.

1
2 4.52 When both NUNEZ and ENDOLITE were made aware of their
3 transgressions to contract and the law and the interferences thereof, both took
4 separate but similar postures of BREACH and FRAUD.

5
6 **ENDOLITE AND OTTO BOCK SPECIFIC ACTIONS IN FRAUD**

7
8 4.53 ENDOLITE is the US arm of Blatchford UK, a Britain based prosthetics
9 manufacturer.

10
11 4.54 OTTO BOCK US is an American operation of a German manufacturer.

12
13 4.55 In the early 90's - The Intelligent Prosthesis Knee (IP) was the first
14 commercially available microprocessor controlled (MPC) prosthetic knee. It
15 was a pneumatic knee released by Chas. A. Blatchford & Sons, Ltd., of Great
16 Britain, in 1993, (BLATCHFORD) and an improved version of the knee was
17 released in 1995 by the name Intelligent Prosthesis Plus (IP+). BLATCHFORD
18 released another knee, the Adaptive Prosthesis, (AP) in 1998.

19
20 4.56 One year earlier in 1997 OTTO BOCK had released the C-Leg a fully
21 hydraulic microprocessor controlled knee.

22
23 4.57 Both companies exaggerated the capabilities of their knees, as OTTO
24 BOCK made claims the knee was safer than it really was and in fact instead of
25 going into safety mode when the battery dies, it goes free swinging, and the
26 ENDOLITE product did not do stance support stumble recovery well, and the
27 hydraulics were prone to failure by sensor issues and leaking oil.

1 4.58 As a result BLATCHFORD made repair replacement cylinder units
2 available that cost about \$2,500 on an \$18,000 knee. It WAS and is the entire
3 workings of the knee save the carbon fiber frame.
4

5 4.59 Pneumatic knees, being air filled by design as the name implies, cannot
6 support weight firmly; and in the case of an Above Knee (AK) amputee, safely.
7

8 4.60 The 1998 AP family was a radical departure from the earlier IP and IP+
9 family of knees. It was a dual hydraulic and pneumatic knee all in one.
10

11 4.61 This was done because the competitor of BLATCHFORD, Otto Bock, had
12 developed and introduced the fully hydraulic MPC C-Leg during the World
13 Congress on Orthopedics in Nuremberg in 1997. The OTTO BOCK began
14 marketing the C-Leg in the United States in 1999; and the C-Leg is a complete
15 in house controlled service and setup all hydraulic MPC knee proposition.
16

17 4.62 It is on reason and belief that controlling the service, setup and repair of the
18 C-leg might more closely guarantee and assure that the product will perform as
19 advertised and the installers – as prostheticists – will follow design parameters
20 to assure any issues can be addressed in continuing improvements to the
21 product and minimize product liability or fraud, but when the warranty expires,
22 no one can get service on a C-leg and cannot do it themselves because OTTO
23 BOCK will not provide the software needed to program the leg to work at all to
24 anyone but their “certified practitioners”; while ENDOLITE and the AP (AP =
25 also now the Smart Adaptive) uses a Bluetooth linked hand-held programming
26 box the end user gets with the leg.
27

28 4.63 The truth is to keep all service and repairs in house allows the design flaw

1 of the C-leg to remain covered up – being that when there is no power – the
2 knee is NOT hydraulic at all and is thus a dangerous free swinging design.

3
4 4.64 A fully hydraulic knee is far superior to a pneumatic one – as just as
5 hydraulics is what is used in “Hydraulic Excavators” to move Earth and do
6 heavy mechanical “work” – because oil does not compress and air does; –
7 BLATCHFORD recognized this and their knee no longer – and never did, or
8 could have or be a valued product as a pneumatic – knee that could not support
9 and allow an AK amputee to enjoy mobility in relative safety.

10
11 4.65 BLATCHFORD further knew their efforts would be a colossal failure if
12 they could not release a competing knee to the C-leg – their solution being the
13 1998 Adaptive Prosthetic knee (AP) with the claim to fame being it was “self
14 learning” as a derivative of the IP+ pneumatic knee, unlike the C-Leg.

15
16 4.66 The BLATCHFORD AP knee suffered from an obvious design flaw anyone
17 who deals in sensor systems would immediately know, being that the relative
18 fulcrum force needed to properly sense the shifts of the body weight to instruct
19 the Microprocessor *needs to be collected from the ankle area* in order for the
20 Microprocessor to be able to respond correctly for the hydraulic valve
21 adjustments to provide functions while an AK amputee is using it.

22
23 4.67 BLATCHFORD instead designed the AP to do *STILL* a pneumatic swing
24 and only hydraulics in the stance modes of standing, stair descent, slope
25 descent and alleged stumble recovery – and thus located the sensor at the top of
26 the knee and to the rear in the knee itself and then was able to claim no special
27 pylon or foot was needed like the C-leg requires as a direct comparison.

1 4.68 The reality is to manufacture a pylon and place the sensor in the proper
 2 location would increase manufacturing costs and make the AP project knee not
 3 marketable and without apparent advantage compared to the C-Leg.

4
 5 4.69 This was fraud, and deceit by BLATCHFORD as the static and dynamic
 6 mechanics for an Apples for Apples comparison was completely untrue, and
 7 not only was this theoretically untrue, OTTO BOCK in 2008 sponsored a study
 8 – which anyone can reproduce the results of – that shows the AP knee by
 9 BLATCHFORD does not perform as advertised.²²

10
 11 4.70 What the study also shows by implication is that only a full Hydraulic Knee
 12 is safe (or safer) to walk on, as the knees which performed well were all fully
 13 hydraulic knees or either the Radial or a straight cylinder SNS design and
 14 Blatchford is just now, introducing a knee they call **Orion** allegedly addressing
 15 these shortcomings long known to exist and that were defectively designed.

16
 17 4.71 The Ossur Rheo Knee is [magnetohydrodynamic](#) hydraulic fluid operated by
 18 electricity; but is still hydraulic, and the Fillauer Rel-K is an imported knee by
 19 partnership with Rizzoli Ortopedia S~pA of Italy, which is a Hydraulic knee
 20 “substantially equivalent” to the C-leg according [the FDA’s 510K exemption](#)
 21 [order for the Rel-K](#).²³

22
 23 ²² MECHANISMS OF STUMBLE RECOVERY: NON-MICROPROCESSOR
 24 CONTROLLED COMPARED TO MICROPROCESSOR-CONTROLLED
 25 PROSTHETIC KNEES, Kenton Kaufman, PhD, PE; Todd Anderson, CP; Greg
 26 Schneider, CP; Kimberly Walsh, MS BME, Biomechanics/Motion Analysis
 27 Laboratory, Mayo Clinic, Rochester, Minnesota; Professional and Clinical
 Services, Otto Bock' Minneapolis, Minnesota. (published in 2008)

28 See [http:// www.oandp.org/publications/jop/2008/2008-38.pdf](http://www.oandp.org/publications/jop/2008/2008-38.pdf)

²³ http://www.accessdata.fda.gov/cdrh_docs/pdf10/K101859.pdf

1
2 4.72 OTTO BOCK has now released a new version of the microprocessor
3 controlled knee of the C-Leg family called Genium. (another is the Compact)

4
5 4.73 The Genium has updated features of the C-Leg the C-leg latest version of
6 the firmware for it allowed a C-leg to do by the latest software updates.

7
8 4.74 Both OTTO BOCK and ENDOLITE have declared the new knees in the
9 family of the previous 510K exempted C-Leg and AP knee with the FDA.

10
11 4.75 Both the Orion and the Genium use the same business end bolt in hydraulic
12 center to center distances and in many ways the parts between the knee designs
13 could interchange inexpensively as to offer an upgrade to an existing knee
14 shell; or could be designed less expensively as an upgrade kit or system.

15
16 4.76 OTTO BOCK also prepared and released a video explaining that all other
17 MPC knee on the market go into free swing mode at “toe-off” and thus none
18 have what would be “dynamic” stance support (stumble recovery) but the C-leg
19 as all other knees – except the Ossur Rheo Knee are NOT full hydraulic knees
20 because the C-leg requires POWER and sensors to work as advertised.

21
22 4.77 The average AK amputee does not know this – as there is no requirement of
23 warning (even like on a pack of cigarettes) as to the limitations of the product
24 and nor is there a Federal requirement (as on a pack of cigarettes) requiring the
25 manufacturer to warn of limitations or hazards therefrom the product. What
26 exists is 21 CFR 820.198 and 21 CFR 820.200 as to a mandate to keep records
27 of complaints and service issues as promulgated by the FDA.
28

1 4.78 Around the time this study was released, Burgess was walking on an AP,
2 and it would not switch modes reliably and was a dangerous and uncomfortable
3 knee to walk on – then the hydraulic cylinder failed and began leaking oil, and
4 this is common issue which sends many amputees to eBay to search for a
5 reasonably priced replacement from possibly a Probate Estate or the like.

6
7 4.79 The study is attached as **EXHIBIT M**. See summary charts pg 2-3
8

9 4.80 BLATCHFORD is well aware that it had on the market a fraudulently built
10 and marketed knee, and seeks to capitalize on the residual and often inept
11 prostheticists market who cannot or will not attend OTTO BOCK C-leg
12 training and follow a strict regimen of complete prosthetic leg setup and
13 maintenance for safety and function of the item, yet the AP and C-Leg bills
14 largely the same and is promoted as the same when the truth is that the AP was
15 grossly inferior to a properly working C-Leg.

16
17 4.81 Plaintiff Burgess has worn and walked in both legs and can attest to the
18 study results.
19

20 4.82 ENDOLITE had published without access restriction in 2010 specifications,
21 schematics and setup manuals on its website at <http://www.endolite.com> and
22 on its customer service page spoke to direct “customer service” – as the
23 “customers” are the wearers – an amputee; and, mentions ordering of parts
24 direct and had no restrictions to accessing contact numbers and information.
25

26 4.83 This information as presented and published was untrue, as they would not
27 service customers direct and as it was presented, would lead someone to
28 believe that service and parts are available to induce them to buy, but it is not

1 true, so after being sued in 2011 they re-worked their website and removed it.

2
3 4.84 Plaintiff has a bit of a history with ENDOLITE dating back to late 2008
4 when he contacted the company complaining that the stumble recovery and
5 slopes and stair feature never did work and that the cylinder had further began
6 leaking and lost all hydraulic support and oil when he spoke with Malcolm
7 Owens who described that the best way to go would be to upgrade the knee to a
8 Smart Adaptive by putting in part number 239046U (Smart Adaptive upgrade)
9 and not part number 239745U – the standard AP replacement and control card
10 and programmer everyone at Endolite knows especially does not work well.

11
12 4.85 Plaintiff contacted ENDOLITE to affirm the upgrade was still available and
13 sent detailed email (**EXHIBIT N**) outlining who would be purchasing it, and
14 the SPSCO (Southern Prosthetics Supply Company) HPC Manufacturing
15 account number – as SPSCO is ENDOLITE's sole and approved distributor to
16 show and verify that HPC Manufacturing is and was at all times a qualified
17 purchaser and why this is and was a direct contact to ENDOLITE.

18
19 4.86 ENDOLITE replied with a fax quote shown as **EXHIBIT O** which creates
20 a binding electronic contract between plaintiff and Endolite pursuant to
21 *Campbell v. General Dynamics Government Systems Corp.*, [407 F.3d 546](#) (1st
22 Cir. May 23, 2005) [citing the e-sign act - 15 USC 7001(a)] in that:

23
24 Notwithstanding any statute, regulation, or other rule of law (other
25 than this subchapter and subchapter II of this chapter), with respect to
26 any transaction in or affecting interstate or foreign commerce — (1) a
27 signature, contract, or other record relating to such transaction may
28 not be denied legal effect, validity, or enforceability solely because it
is in electronic form.

1 4.87 The ENDOLITE quote had minor errors – even though the initial email was
2 clear it was an HPC Manufacturing purchase, and if there was confusion at
3 ENDOLITE, they should not have sent the quote.

4
5 4.88 The knee and payment was rushed into the mail as Priority Mail at 5 pm.

6
7 4.89 This quote and promise to upgrade when sent by ENDOLITE was false.

8
9 4.90 NUNEZ had drafted from his bank account a certified check to pay – as his
10 credit card did not have a sufficient daily limit, so against plaintiff
11 BURGESS's wishes he obtained a cashiers check to pay Burgess direct.

12
13 4.91 The cashiers check turned out to be a problem because while his Bank
14 would cash it – they would not issue a check from Burgess to ENDOLITE for
15 the repair portion, thus plaintiff and NUNEZ travelled together to the bank so a
16 cashiers check could be purchased for ENDOLITE from Burgess's sales
17 payment and be able to thus get the item in the mail that day before 5 pm.

18
19 4.92 When the package arrived as addressed to Attn: Malcolm, and a clarification
20 email was sent to be sure and return the item back HPC Manufacturing,
21 something happened at Endolite which leads Plaintiff to believe that
22 reservations were afoot in-house about selling a \$15,000 product for an
23 upgrade price of \$2,500, after ENDOLITE called and spoke with NUNEZ who
24 provided information to Teresa Stratton NUNEZ was not only not authorized to
25 give, but on reason and belief provided in an erroneous fashion not
26 emphasizing that NUNEZ too was a member of HPC Manufacturing.

27
28 4.93 ENDOLITE was sent another email making this clear once again, but

breached the agreement and returned the item without performing the work, claiming HPC was not an O&P facility or had Prostheticist on staff even though AGAIN . . . NUNEZ was a member of HPC and held an interest in it.

4.94 When an aggrieved party brings an action under which a violation of Title 42 USC, Chapter 126, §12182(b)(2), and/or Title 42 USC, Chapter 126, §12182(b)(1)(B) as alleged in Cause of Action Five, the remedy and procedure for the court to hear such a complaint is by LAW, an injunctive one, as set forth by Title 42 USC, Chapter 126, §12188(a)(1)

4.95 The defendants – OTTO BOCK and ENDOLITE – insist on proceeding in brazen violation to Federal law and the ADA law section which reads

Sec. 12188. Enforcement

(a) In general

(1) Availability of remedies and procedures

The remedies and procedures set forth in section 2000a-3(a) of this title are the remedies and procedures this subchapter provides to any person who is being subjected to discrimination on the basis of disability in violation of this subchapter or who has reasonable grounds for believing that such person is about to be subjected to discrimination in violation of section 12183 of this title. Nothing in this section shall require a person with a disability to engage in a futile gesture if such person has actual notice that a person or organization covered by this subchapter does not intend to comply with its provisions.

4.96 Title 42, Chapter 21, Subchapter II, § 2000a-3 reads:

§ 2000a-3. Civil actions for injunctive relief as thus:

(a) Persons aggrieved; intervention by Attorney General; legal representation; commencement of action without payment of fees,

costs, or security

Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by section 2000a–2 of this title, a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order, may be instituted by the person aggrieved and, upon timely application, the court may, in its discretion, permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance. *Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the civil action without the payment of fees, costs, or security.*

4.97 ENDOLITE and OTTO BOCK in this matter were and are operating as a “SALES ESTABLISHMENT” under the public accommodations definition found at Title 42 USC, Chapter 126, §12181(7)(E) through their “certified practitioner” requirement axioms as issued by OTTO BOCK and ENDOLITE are agents in their requirements as certified by the on-line operation of <http://www.bocusa.org> or <http://www.abcop.org> who by nature of the self appointed exclusionary certification itself are violators of Title III of the Americans with Disabilities Act (42 U.S.C. § 12181,et seq.);

4.98 ENDOLITE and OTTO BOCK in this matter discriminated as found in the public accommodations definition found at Title 42 USC, Chapter 126, §12182(b)(1)(A)(i).

4.99 Title 42 USC, Chapter 126, §12101(a)(2) equates “person” with “individual” as thus:

“in enacting the ADA, Congress recognized that physical and mental disabilities in no way diminish a **person’s right** to fully participate in all aspects of society, but that people with physical or mental disabilities are frequently precluded from doing so **because of prejudice, antiquated attitudes, or the failure to remove societal and institutional barriers;**” [emphasis added]

4.100 Defendants’ attitudes are that a disabled individual who lacks the “purchased” certification, lacks intelligence to turn a set screw or follow setup directions also, absent any regulation by law found anywhere and especially not in the Federal Food Drug and Cosmetic Act *infra*, of which the FDA administers and has exempted the external knee device from anything but a record keeping requirement for complaints an quality of materials used in its manufacture by the manufacturer, but this is nothing but a ruse. An external prosthetics knee is an over the counter item by classification and description.

4.101 That Title 42 USC, Chapter 126, §12101(b) sets enforcement purposes as:

(b) Purpose

It is the purpose of this chapter

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

Thus no “manufacturer” exclusion may be added or argued without the express consent of Congress, and defendant argue thus without good faith to modify or reverse existing law.

4.102 There is NO exclusion for a manufacturer to discriminate and no argument as defense of same. See Title 42 USC, Chapter 126, §12182(b)(1)(B)(a)(i)

4.103 Cal. Civ. Code 51(f) reads:

(f) A violation of the right of any individual under the Americans with Disabilities Act of 1990 (Public Law 101-336) shall also constitute a violation of this section.

State law makes the definition of “individual” a “person” under State Law.

OTTO BOCK AND ENDOLITE ARE ALSO CONSIDERED AS OPERATORS OF PLACES OF PUBLIC ACCOMODATION

4.104 *In Skaff v. Meridien North America Beverly Hills, LLC*, [506 F. 3d 832](#) -

Court of Appeals, 9th Circuit 2007, the Ninth Circuit wrote in part:

“The existence of standing turns on the facts as they existed at the time the plaintiff filed the complaint. Lujan, 504 U.S. at 569 n. 4, 112 S.Ct. 2130. Though the party invoking our jurisdiction bears the burden of establishing that party's standing, “[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice.” Id. at 561, 112 S.Ct. 2130.”

4.105 As found in this complaint, ENDOLITE operates an “Education Department” at their facility “that will allow for customer visits and onsite training” and this is sufficient to meet the public accommodation requirement,

1 and as does OTTO BOCK but more importantly both parties utilize an agency
2 relationship to “certified practitioners” which are their “brick and mortar” arms
3 to the companies as sales and direct “installation” and manufacturing agents.

4
5 4.106 Endolite also operates a shipping department pursuant to 28 CFR
6 36.305(b)(1) to its customers.

7
8 4.107 Who the Endolite customers are, is defined at 21 CFR 820.198 called
9 “complainants” by the FDA, FD&C Act; who would be the actual consumers
10 or users of the device, and is further addressed in 21 CFR 803 et seq.

11
12 4.108 Nowhere in 21 CFR 803 is a “prostheticist” found as a licensed person,
13 professional or type of facility covered in that section, nor can be a customer.

14
15 4.109 21 CFR 820 subparts “I” and “J” constitute the actions such as complaint,
16 non-conforming product and the such which Endolite is required to maintain as
17 records by the Food Drug and Cosmetic Act (FD& C) as even a 501K exempt
18 device manufacturer, to comply with all other aspects of the FD&C Act.

19
20 4.110 One such compliance assistance company “mastercontrol.com”²⁴ describes
21 their software compliance assistance solution product as it relates to 21 CFR
22 820 subparts “I” and “J” as providing the following features:

23
24
25 ²⁴ MasterControl is a global organization with offices in North America, United
26 Kingdom, and Asia. MasterControl software solutions enable over 400 companies
27 around the world to accelerate their time to market, while reducing overall costs
28 and increasing internal efficiency. MasterControl Inc., 6322 South 3000 East,
Suite 110, Salt Lake City, Utah 84121, P 1.801.942.4000, F 1.801.942.7088 See
also http://www.mastercontrol.com/21_cfr_regulations/21_cfr_part_820/

MasterControl CAPA integrates corrective action process with other quality processes. A CAPA form can be launched directly from another form (i.e., a nonconformance report). Automatically enters relevant data into a CAPA form, reducing data entry and eliminating errors from manual transfer of information. ***Through the Internet, customers and vendors outside the company can submit customer complaint or other forms that could lead to CAPA.*** Provides customizable reporting capabilities to help managers monitor entire quality management life cycle.

Thus evidencing who Endolite calls “customers” ARE the consumers, users or wearers. Prostheticists would thus have to be “vendors”. “CAPA” is short for “corrective and preventive action (CAPA) procedures”.

4.111 When a person orders any product from Endolite, the company obtains the wearer’s name, height, weight and other item specific ordering information, and thus the company’s local “sales agent” with the direct connection to the company is often that person described as, or called, a “prostheticist”; however Endolite directly states it deals with its customers, and in any sense of the word it is still a place of public accommodation by its own descriptions.

4.112 An ADA plaintiff is not required to actually visit a facility so long as they become aware of a “policy” which will deter further patronage. In *Chapman v Pier One Imports #1132*, [593 F.3d 974](#) (2010), the 9th Circuit en banc January 7, 2011, ruled; {citing “*Doran v. 7-Eleven Inc.*, [524 F.3d 1034](#), 1039 (9th Cir. 2008) (quoting *Trafficante v. Metro. Life Ins. Co.*, [409 U.S. 205](#), 209 (1972)).}

““Once a disabled individual has encountered ***or become aware*** of alleged ADA violations that deter his patronage of or otherwise interfere with his access to a place of public accommodation, he has already suffered an injury in fact traceable to the defendant's conduct and capable of being redressed by the courts, ***and so he possesses***

1 *standing under Article III* [Doran, 524 F.3d at 1042 n.5.] . . .

2 As defined by the ADA, unlawful "discrimination" occurs when
3 *features of an accommodation*, [emphasis added]

4 subject an individual or class of individuals on the basis of a
5 disability or disabilities of such individual or class, directly, or
6 through contractual, licensing, or other arrangements, to a denial of
7 the opportunity of the individual or class to participate in or benefit
8 from the goods, services, facilities, privileges, advantages, or
accommodations of an entity. [42 U.S.C. § 12182(b)(1)(A)(i), (ii)]”

9 *Nowhere does this require any “purchase” or “ownership”* to have Article
10 III standing, *only to be “aware” of the violations*

11
12 4.113 January 4, 2011, the 9th Circuit Court of Appeals issued *Enyardt v NCBE*,
13 from an appeal of C09-5191 CRB (N.D. Cal 2010)(Document 58 filed 2/4/10
14 granting the ADA injunctive Relief) where Judge Stephen Breyer went
15 through a meticulous analysis of what the procedure for determining what an
16 ADA Injunctive Relief standard is and what cases support argument upon it.

17
18 4.114 Plaintiff discovered and showed defendants the *Enyardt* course of hearing
19 Injunctive Relief under the ADA. In that order, as appealed to the Ninth
20 Circuit found there as *Enyardt v NCBE*, 10-15286 and 10-16392 (9th cir Jan 4,
21 2011) as consolidated, the Ninth Circuit affirmed policy and ADA procedure

22
23 4.115 January 4, 2011, in *Enyardt v NCBE*, 10-15286 and 10-16392 (9th cir Jan 4,
24 2011) as consolidated, the Ninth Circuit was clear to begin with:

25
26 We have jurisdiction to review the district court’s orders granting
27 these preliminary injunctions pursuant to 28 U.S.C. § 1292(a)(1). Our
28 review is for an abuse of discretion. *Does 1-5 v. Chandler*, 83 F.3d
1150, 1152 (9th Cir. 1996). “[I]n the context of a trial court’s factual

findings, as applied to legal rules,” to determine whether a district court has abused its discretion, “the first step of our abuse of discretion test is to determine de novo whether the trial court identified the correct legal rule to apply to the relief requested. If the trial court failed to do so, we must conclude it abused its discretion.” *United States v. Hinkson*, 585 F.3d 1247, 1259, 1261-62 (9th Cir. 2009) (en banc) (footnote omitted). If the trial court identified the correct legal rule, “the second step . . . is to determine whether the trial court’s application of the correct legal standard was (1) ‘illogical,’ (2) ‘implausible,’ or (3) without ‘support in inferences that may be drawn from the facts in the record.’ ” Id. at 1262 (footnote and citation omitted). We may affirm the district court on any ground supported by the record. *Canyon County v. Sygenta Seeds, Inc.*, 519 F.3d 969, 975 (9th Cir. 2008).

4.116 For injunctive relief the ADA standard is the one followed in Enyardt

REFUSAL TO SELL OR SERVICE IS AN ADA VIOLATION

4.117 At issue here is the refusal to sell product to or service product of an ADA individual – the amputee wearer – specifically because they are NOT an industry contrived “certified practitioner” found nowhere in medical science, and this is a violation of Cal. Civ. Code 51.5.

4.118 In *Lockett v. Catalina Channel Express Inc*, [496 F.3d 1061](#), (9th Circuit August 09, 2007), Lockett was not allowed to purchase a first class ticket due her guide dog and a pet dander issue policy of *Catalina Channel Express Inc* (CCE) in the First class cabin area where customers wanted to pay extra to be free of pets onboard and the allergy and dander issues of other passenger.

4.119 The Ninth Circuit found that the refusal to sell would have been an ADA violation, as thus “. . . CCE may well have violated the ADA had it not

changed its policy”, citing to its footnote 6.

4.120 A few months later in *Skaff v. Meridien North America Beverly Hills, LLC*, [506 F. 3d 832](#) - (9th Cir November 2007), was reversed and remanded on an issue of Attorneys fees because a Hotel staff that initially got a reservation wrong, but fixed the ADA issues immediately; and immediately settled when sued under the ADA, the court stated that though *Meridien* settled; the ADA person still had a viable cause of action because in his stay he found other things out of compliance to ADA law, and thus had standing to bring the suit.

4.121 *Skaff and Lockett* both illustrate that there and here also, it is the policy of Defendants Endolite and Otto Bock, not the actual refusal to have shipped the item based on any contrived contract or lack of it, that drives the law.

4.122 Further, the court in a previous order of June 20, 2011 myopically viewed the case from the defendants argument, rest on the fact the ADA claim fails because the Defendants Endolite and OTTO BOCK simply refuse to ship to non certified²⁵ personnel, is grand error and a violation of the ADA.

4.123 More recently in *Dudley v. Hannaford Bros. Co.* [333 F.3d 299](#) (1st cir June 24, 2003) the court found that refusal to sell alcoholic beverages to a disabled person who appeared intoxicated, but was really neurologically damaged due an auto accident was a violation under the ADA.

²⁵ NOTHING exists about prostheticists being LICENSED parties, but indeed rather the complaint makes it clear that prostheticists are NOT licensed in California and there is no oversight or licensing arm of the State government that does so. They “purchase’ a certification from the Internet which means NOTHING as to expertise, experience, training or success in crafting and building operating, well fitting, prosthetics for satisfied customers.

1
2 4.124 In Dudley, the court focused on the stereotype that other place on ADA
3 individuals in rushing to judgment about them and their capabilities.

4
5 4.125 Here Endolite's policy and Otto Bock's policy and activities, and even yes
6 many courts view of this in the past reflects that stereotypical discrimination.

7
8 4.126 There is no such thing as a licensed prostheticist in California and even if it
9 were – a license means nothing about who is qualified to set up the item, BUT
10 the actual wearer of it, the policy is instead a segregated distribution model.

11
12 4.127 In this case, a prostheticist can in no way be experienced at all in wearing or
13 walking in a prosthetic and cannot tell if the wearer truly feels or is safe or not.

14
15 4.128 Then in *Townsend, v. Quasim*, [328 F.3d 511](#), (9th circuit May 1, 2003) is
16 found the first evidence of a segregated distribution model of goods and
17 services in an ADA Title II healthcare context.

18
19 4.129 In [Townsend](#), the case was one of entitlement to home care versus a
20 requirement to then have to go to live in a nursing home based on “medically
21 needy” versus “categorically needy”, and the Ninth Circuit wrote in part;

22
23 “But policy choices that isolate the disabled cannot be upheld solely
24 because offering integrated services would change the segregated way
25 in which existing services are provided. *Olmstead* makes that clear,
26 for precisely that alteration was at issue in *Olmstead*, and *Olmstead*
27 did not regard the transfer of services to a community setting, without
28 more, as a fundamental alteration.”

29 4.130 Here we have the same stereotype AGAIN time and again it seems.

Endolite and OTTO BOCK seek to maintain a segregated distribution model for their own financial gain of keeping the prices of their product artificially high and out of the reach of many ADA individuals who want and need them or who do not want the assistance of a prostheticist who has two good legs trying to tell an amputee how the prosthetic works when the amputee walks in it every day and the prostheticist NEVER has – unless he too is an above knee amputee.

4.131 There are no “fundamental alteration” or “undue burden” or “direct threat” defenses to this clearly ADA discriminatory segregated distribution model that is without basis in law or fact, and defendants cannot make out any.

4.132 Prosthetic devices and parts are fancy over the counter hardware items as illustrated in particular by K12prosthetics – who builds knees using bicycle shock absorbers as parts – it is built of simple hardware normally.

4.133 Defendants cannot show any affirmative defense here available to them in ADA law which are “fundamental alteration”; “direct threat”; or “undue burden”; and they have no excuse as a defense. Dudley and Townsend Id.

EBAY, PAYPAL AND ALIEXPRESS TRANSGRESSIONS

4.134 With the advent of online selling, each domain owner has attempted to alleviate the legal issues to themselves of the legal realities of how their business is set up.

4.135 eBay has a system that is unfair and promotes fraud by allowing anyone to “bid” on an item, who is kept secret, and over a span of time they can

1 artificially increase the price of an item with no guarantee they are a true
2 interested buyer, or will pay for same, and often the seller themselves has
3 friends inflate the price by this bidding method if there is just one other person
4 who appears interested, and eBay calls this “shill” bidding but turns a deaf ear
5 and dead eye to it as all it really does is inflate the final value fee due eBay.

6
7 4.136 eBay persistently maintains it is not involved in the eBay and auction
8 transactions, but a compendium of other laws, including especially 21 USC
9 331(a) and (c) clearly show that is, as eBay declares the “seller” is the eBay
10 member who listed the item, while the Uniform Commercial Code does not.

11
12 4.137 eBay and Aliexpress utilize “feedback” customer reporting systems, a
13 process started by eBay in its early days to identify how things might be
14 improved and to identify problem transactions between users of their service.

15
16 4.138 It appears 47 USC § 230 protects the Internet provider who allows
17 “Feedback” to be posted if it is unedited, but does not protect the poster, nor
18 violations of other criminal, intellectual, state or privacy law applicable, [47
19 USC § 230(e)] and nor does it protect facilitators of such information delivery
20 systems which by their construction allow or cause violation of said laws.

21
22 4.139 In many cases, consumers, and certainly those purchasing healthcare
23 related items have a right under the Health Insurance Portability and
24 Accountability Act (HIPPA) to privacy, and it can be an unfair business
25 practice and well as interference with prospective economic advantage or
26 contract to publish such information as to purchases if the consumer does not
27 want same done, but eBay and Aliexpress and many other online retailers have
28 convoluted the spirit of intent of 47 USC § 230 to force an invasion of privacy

1 upon persons absent choice for their purposes of information with feedback.

2
3 4.140 In the case of any healthcare or disability item related sale, posting
4 “feedback” is facilitating, causing and allowing a HIPPA violation.

5
6 4.141 Further if notified, or it is apparent the item for sale is a disability or
7 healthcare related item, the supplier, vendor and seller, have a HIPPA duty.

8
9 4.142 In the cases where a User Agreement allows the User as a supplier to list an
10 item for sale that binds the domain owner to a degree of liability such as a
11 “Buyer Protection Program”, that is an agency relationship and the true “seller”
12 of the item is the domain owner no matter how the domain owner wants to
13 characterize the legal relationship to the supplier, and this is especially true if
14 the domain owner collects the money in the sale for the supplier under terms
15 the domain owner sets.

16
17 4.143 21 USC 331(c) is inclusive of any advertisement of a misbranded item as
18 thus: “(c) The receipt in interstate commerce of any food, drug, device, tobacco
19 product, or cosmetic that is adulterated or misbranded, and the delivery or
20 proffered delivery thereof for pay or otherwise.”

21
22 4.144 Thus liability rests squarely on the domain owners who make promises like
23 as eBay, PayPal and Aliexpress does in their “Buyer Protection Programs”.

24
25 4.145 Whether an item is inclusive of those of 21 USC Chapter 9 - FEDERAL
26 FOOD, DRUG, AND COSMETIC ACT is a matter of its use and design.

27
28 4.146 Each day persons with characteristics listed or defined in subdivision (b) or

1 (e) of Section 51, of sec 51.5 of the California Civil Code buy, sell or list items
2 on eBay or use PayPal for transactions initiated in other ways and the Buyer
3 Protection Program of eBay and PayPal unlawfully interferes with those
4 transactions in a discriminatory manner depriving them of rights as promised
5 by the eBay and PayPal User Agreements under California law and such
6 interferences are both a tort and breaches of the User Agreement contract.

7
8 4.147 eBay is the primary place to purchase used prosthetic parts and C-Legs are
9 always found there for sale or auction.

10
11 4.148 eBay has a Medical Device policy it does not follow that requires medical
12 disclaimers and an address listing of the drop shipper eBay calls a “seller”.

13
14 4.149 eBay began business as a sales facilitator, but today is actually the merchant
15 as the seller who collects the funds, controls the shipping and returns, warrants
16 the sale through a Buyer Protection Program and maintains a master servant
17 agency relationship among its members and by law this makes today’s eBay the
18 merchant and the eBay User who lists the item a “drop ship supplier” today.

19
20 4.150 eBay has persistently maintained it is not a consignment vendor but the
21 second restatement on agency finds that eBay is the merchant as a consignment
22 vendor because of how eBay allows its members to bind eBay to a warranty
23 policy as defined by California Uniform Commercial Code 2313 by listing any
24 item on eBay which is then automatically covered by what eBay and PayPal
25 call the “Buyer Protection Program” of which eBay prominently displays on
26 every page “get the item you ordered or get your money back”; where eBay and
27 PayPal step in to make a ruling and will back charge the suppliers account and
28 provide a return shipping label to return the item top the supplier; and this fits

1 the 2nd Restatement on Agency as to liability of the principal and as to
2 limitations on and controlling communications as eBay prohibits direct email
3 communication between the supplier and buyer.

4
5 4.151 As to the medical device policy and to “misbranding”, eBay freely allows
6 this to be done by suppliers and then will not adjudicate the proper resolution
7 to the issue when a supplier member commits such an infraction of the law for
8 the buyer to “get the item you ordered or get your money back”.

9
10 4.152 There is a provision in California law which provides instead for specific
11 performance in California Uniform Commercial Code 2710 to 2713, due a
12 repudiation by “misbranding” by a supplier, but eBay ignores this.

13
14 4.153 For instance, when sent the required CLRA demand notice under Cal. Civ.
15 Code 1750 et seq at 1782(a)(2), eBay and PayPal responded without
16 explanation or meeting or addressing the demands of the letter by reinstating
17 the account of plaintiff Burgess on eBay and refunded the \$6.77 that was taken
18 as partial payment for a Buyer Protection Program ruling involving eBay
19 member Barry Ames. Attached as **EXHIBIT P** respectively as required by
20 Cal. Civ. Code 1782(a)(2) as proof to the court, but while eBay claimed it
21 removed the suspension and zeroed out any balance due, the account remained
22 suspended. See **EXHIBIT G**

23
24 4.154 On 11/2/2010 10:00 AM eBay removed a listing for artisan supplies to
25 build a socket for an amputated limb claiming it required a prescription from a
26 practitioner and no such thing is true. See **EXHIBIT Q MC036 eBay**
27 **Listing Removed: Medical and Prescription Items (426349225)** - eBay item
28 170501441697 - Complete carbon fiber socket kit 4 prosthetic leg knee.

1
2 4.155 This action represented an ill-informed action of discrimination because it
3 was only an instruction set, and no such prescription is required to form or
4 build such a socket, and eBay cited no law which gave them any right to do so,
5 but instead it violates rather the Unruh Act and the ADA at 42 USC 12182.

6
7 4.156 While obviously someone must have complained to eBay in fraud, likely a
8 prostheticist who did not want the competition – as Burgess had received
9 several emails from eBay members who represented themselves as
10 prostheticists, angry that an amputee dare to build his own leg, eBay would not
11 and did not reveal who brought any such complaint or the source of
12 verification as to the veracity of it, and given that several kits had been sold,
13 previously this represented an interference with prospective economic
14 advantage and contract both intentional and by negligence.

15
16 4.157 The materials in the **MC036 eBay Listing that was Removed as a**
17 **Medical and Prescription Item (426349225)** - eBay item 170501441697 -
18 Complete carbon fiber socket kit 4 prosthetic leg knee were materials that can
19 be bought at any plastics and fiberglass or boat repair store, and drug store or
20 woman's boutique and in this act of removal eBay violated 42 USC 12182.

21
22 4.158 The removal of this listing also illustrated an Olmstead violation by
23 stepping in to prohibit an ADA qualified individual the right to obtain and use
24 goods and services in the setting most appropriate to their needs.

25
26 4.159 eBay also thus has a "Buyer Protection Program" it does not utilize to
27 improve "safe buying experiences" as it claims and promises in its User
28 Agreement and policies; and, it is aware the C-leg does not have software

1 available to program it and allows them to be sold absent full disclosure, when
2 on most other places on eBay – such as to buy a cell phone – eBay puts up
3 information about the item when listed to tell what is included or needed.
4

5 4.160 eBay and PayPal through its Buyer Protection Programs discriminates
6 against ADA individuals “everyday” and they simply have no way to bring
7 suit; but in particular eBay violates the Unruh Act at Cal. Civ. Code 51.5 to
8 “boycott” and “blacklist”, causing a refusal to sell to or buy from ADA persons
9 by suspending accounts, removing listings and failing to adhere to state law
10 and its own Medical Device policy even when it refuses to list an item, take
11 proper action on a complaint or arbitrarily and capriciously causes damage in
12 suborning fraud by a seller who seeks to unload a non-functioning prosthetic
13 item claiming “like new” “condition unknown” or some other excuse the seller
14 often knows is not true and is used to sell the item in fraud.
15

16 4.161 With regard to plaintiff Burgess, eBay removed an ongoing – self renewing
17 - ADA individual listing in one case and in another allowed a buyer to damage
18 an ADA “handicap control” item and return it; and in another case, eBay sided
19 with a fraudulent seller going so far as moving to dismiss the litigation filed
20 when eBay was not even named for any form of damages in USDC-CAND
21 [5:09-cv-00629-JF](#) Burgess v. Forbes et al filed 02/12/09 and closed 05/29/09
22 before Mr. Forbes a fraudulent C-Leg seller, could even be served, and given
23 the promises made by the eBay User Agreement to be construed under and
24 enforce California law, this simply has not been what is happening.
25

26 4.162 eBay and PayPal have both been operating under unlawful contracts and
27 built their business systems from very nearly the beginning - as both have
28 systems to escape the proper and required registration of DBA requirements of

1 Business and Professions Code Section 17900 – 17930

2
3 Business and Professions Code 17918 specifies "No person
4 transacting business under a fictitious business name contrary
5 to the provisions of this chapter, or his assignee, may maintain
6 any action upon or on account of any contract made, or
7 transaction had, in the fictitious business name in any court of
8 this state until the fictitious business name statement has been
9 executed, filed, and published as required by this chapter. For
10 the purposes of this section, the failure to comply with
11 subdivision (b) of Section 17917 does not constitute
12 transacting business contrary to the provisions of this chapter."

13
14
15 4.163 Yet eBay provides for on site DBA "User ID's" without checking it is the /
16 a registered Fictitious name DBA filed in the county the eBay User Agreement
17 contract specified as the controlling jurisdictional county, and PayPal the same
18 using "email addresses" for the DBA contact, and allowing software that linked
19 to any web presence which could be called anything anywhere. Most County
20 Recorders make it easy to understand the process as the shown at the [Los](#)
21 [Angeles County Recorders site](#)²⁶

22
23 4.164 It is entirely plausible avoiding that of averment of a DBA makes it easier
24 to avoid collection and payment of use or sales taxes as a California business
25 and eBay avoids the duty to collect tax as the eBay User Agreement contract
26 specifies will be the case for a California Business operating and to be

27
28 ²⁶ http://rrcc.lacounty.gov/Clerk/Business_Name.cfm

1 interpreted under California law and avoids CA Franchise Tax Board issues.

2
3 4.165 The only way this is not unlawful is if the eBay supplier is a drop shipper
4 upon a sale to eBay by a flat fee consignment price as is actually eBay's setup

5
6 4.166 It is entirely plausible upon reason and belief DBA avoidance makes
7 selling on eBay thus more attractive as costs and taxes would raise eBay fees
8 by 15% to around at least 25 % of the sales amount, and be an unattractive
9 reality.

10
11 4.167 Defendants by an unlawful contract using "policies" contrary to state laws,
12 engage in a practice of indefinitely shutting down Plaintiffs' online stores and
13 businesses efforts, in violation of other provisos of law as prohibited by Cal.
14 Civ. Code 1608, 1667, 1668 and 1708 are thus interfering with them in the
15 course of their business efforts, advantages and contracts without just cause or
16 lawful right, and in violation of the procedures outlined in its own rules and
17 regulations which are then Tortuous Interferences to Prospective Economic
18 Advantage and Contract as set forth and clarified by the California Supreme
19 court in [Korea Supply Co. v. Lockheed Martin Corp., 131 Cal.Rptr.2d 29](#)
20 [\(2003\); 29 Cal.4th 1134, 63 P.3d 937](#)

21
22 4.168 Defendant eBay provides and operates a public defamation and interference
23 with prospective economic advantage software platform and toolset they call a
24 "Feedback System" and "Detailed Seller Rating" where anyone who purchases
25 from an eBay supplier, can leave disparaging and untrue comments about the
26 transaction, which is then used by eBay in punitive measures in violation of
27 Cal. Civ. Code. 1608, 1667, 1668 and 1708 and as a tool of Unfair
28 Competition violating California's UCL, (Bus & Prof Code 17200 et seq)

1
2 4.169 Defendants' eBay and PayPal "policies" which by links are integrated in
3 their user contracts do not follow California or FTC law or express legal rights,
4 many of which are found in the Cal. U. Com. Code. at Division 2; most the
5 codes of which address all the issues of shipping, returns and repudiation of
6 contract that defendants do not utilize in their decisions in Buyer Protection
7 Arbitration Decisions and how the eBay Feedback and Detailed Seller Ratings
8 (DSR) are used all amount to Tortuous Interferences to the class members.

9
10 4.170 A contract which has terms that are or induce unlawfulness is void by
11 California law finds the parties then in a tortuous relationship covered by the
12 Interference Torts to Contract and Prospective Economic Advantage. The
13 Ninth Circuit has further ruled that when one of the Interference Torts have
14 been made out above, it also constitutes a violation of California's UCL, (Bus
15 & Prof Code 17200 et seq) See [CRST Van Expedited, Inc v. Werner](#)
16 [Enterprises, Inc 479 F.3d 1099 \(9th Cir March 15, 2007\)](#) (supports the Erie
17 Doctrine application and the interference torts citing the Korea Supply case
18 apply even when two contracts are involved IS unlawful under the UCL). The
19 only thing the Ninth Circuit got wrong, in the [CRST](#) ruling was that there is
20 no longer a "wrongful intent" component to the Interference Torts, as it was
21 done away with in the very same case cited in [CRST](#) by the California
22 Supreme court in [Korea Supply Co. v. Lockheed Martin Corp., 131](#)
23 [Cal.Rptr.2d 29 \(2003\); 29 Cal.4th 1134, 63 P.3d 937](#)

24
25 4.171 So it is either eBay and PayPal users are actually drop shipping suppliers in
26 accord the master servant relationship of the 2nd Restatement on Agency, or
27 eBay and PayPal are tortfeasors interfering in contractual relations and
28 economic advantage; but in both scenarios eBay and PayPal are mis-branders

1 of medical devices under 21 USC 331(a) being vended where eBay or PayPal
2 collects a fee or facilitates the financial transaction in any mis-branded item.

3
4 4.172 The defendants have “made up” and coined new terms to avoid the
5 application of the proper law associated with the action and that does not make
6 it any more legal, and the court needs to address this by law and halt it.

7
8 **THE NEXUS OF THE ADA TO THE UNRUH ACT AND ALL**
9 **DEFENDANTS ACTIONS AS VIOLATIONS TO LAW**
10

11 4.173 There is no law which requires a prescription to sell, buy or own a
12 prosthetic, or sell, buy parts of, or build a prosthetic device for one’s self.

13
14 4.174 There is FDA regulation 21 CFR 820.198 and 21 CFR 820.200 which
15 mandates record keeping, service and support instructions and information
16 with service records for sellers of medical devices with the goal being public
17 safety which all defendants refuse to do – but instead seek the use of a third
18 party to do so which may inflate the price or the item may not work at all when
19 sold, or in the case of OTTO BOCK and the C-Leg will not work at all without
20 further costs – unless it is sold assembled and in each case each transgression
21 amounts to a violation of 42 USC 12182 by fraudulent and discriminatory
22 selling of the item.

23
24 4.175 Further eBay and PayPal arbitrarily and capriciously interfere with the
25 transaction by attempting to adjudicate upon the legal impetus of the
26 transaction if a complaint is made which does not follow whatever terms of the
27 offer for sale entailed or what the law entails as to each party’s true liability
28

1 4.176 In California, "[c]onspiracy is not a cause of action, but a legal doctrine that
2 imposes liability on persons who, although not actually committing a tort
3 themselves, share with the immediate tortfeasors a common plan or design in
4 its perpetration." *Applied Equipment Corp. v. Litton Saudi Arabia Ltd*, [7 Cal.
5 4th 503](#), 510-511(1994). Liability for civil conspiracy generally requires three
6 elements: (1) formation of the conspiracy (an agreement to commit wrongful
7 acts); (2) operation of the conspiracy (commission of the wrongful acts); and
8 (3) damage resulting from operation of the conspiracy. *Id* at 511; see also
9 *People v. Beaumont Inv., Ltd.*, [111 Cal. App. 4th 102](#), 137 (2003) ("In addition
10 to those three elements, it has been said that participants in a conspiracy also
11 must know that their conduct is wrongful.... However, to the extent that
12 knowledge of the scheme's unlawful purpose is required, it may be inferred
13 from the surrounding circumstances, including the nature of the acts done, the
14 relation of the parties, and the interests of the defendants.").

15
16 4.177 Proof of civil conspiracy triggers the "last overt act" doctrine. *Wyatt v.*
17 *Union Mortgage Co.*, [24 Cal. 3d 773](#), 786 (1979). "Under that doctrine, the
18 statute of limitations does not begin to run until the final act in furtherance of
19 the conspiracy has been committed." *Beaumont*, 111 Cal. App. 4th at 137.

20
21 4.178 Under California law, tortious interference with contract is governed by a
22 two-year statute of limitations. *Anderson v. Allstate Ins. Co.*, [630 F.2d 677](#),
23 683 (9th Cir. 1980); see also *Marit: Inc. v. Carlson Mktg. Group*, No. C 07-
24 5585 JSW, 2009 WL 3561521, at *2 (N.D. Cal. Oct. 30, 2009). eBay tortiously
25 interferes in an ongoing basis with its User Members' contracts through its
26 participation in a conspiracy, and therefore the "last overt act" rule governs
27 when the statute of limitations began to run.

4.179 Each class putative member or plaintiff may have additional and differing facts to their causes of action, but the common thread to all is that all ADA members who are amputees are prevented from direct purchase of items which are not restricted sale items from the FDA, and that eBay and PayPal allow the sale of fraudulently sold items which have been placed in the marketplace which are not assured to operate and are of little value without the software to operate and setup the item being the C-Leg with eBay and PayPal have knowledge through a prior lawsuit is happening on their site and using the PayPal service because it has been described that OTTO BOCK refuses to provide the software to the buyer, or sell parts needed to repair the item; and thus eBay and PayPal cooperates in the conspiracy to discriminate toward ADA persons and profit from same, as does ENDOLITE do likewise.

4.180 Prosthetic building – save the bolt on parts purchased – is an artisan field and materials can be purchased at most arts and craft stores or industrial plastics and marine repair stores even, and technique can be learned and application of artisan mold making supplies is seen demonstrated in even TV shows like “Face-Off” on the SyFy network (<http://syfy.com/faceoff>) which is found on the Internet for free also on websites like hulu.com, and direct instruction on how to make a prosthetic socket is found even on YouTube, and material available on line direct for even Orthotics and Prosthetics suppliers now owned by <http://www.smooth-on.com> , so all of this is not such a secret like the prosthetics industry and defendants OTTO BOCK and ENDOLITE would want one to believe by trying to direct ADA persons to a “certified practitioner” of theirs, and this it seems is the point as to why they are so intent on trying to keep it secret – but it is not – it is illegal, unlawful and immoral.

4.181 It is rather about being able to bill into the Healthcare Insurance industry.

HEALTH NET AND IHHI AS OLMSTEAD VIOLATORS

4.182 The sad reality is, before an amputee can get any kind of service for a medical issue or prosthetic issue – they are forced into a physician’s presence who duty it is to hold down costs, and that means denying access to care.

4.183 Amputees have medical issues only a specialist like a Physiatrist or Orthopedic Surgeon who specialized in amputation issues would know, yet routinely amputees are denied access to these proper physicians who are not affiliated with a health plan having a duty and allegiance to hold down costs.

4.184 Olmstead was about not only choice but the ability to receive service in the setting most appropriate to the needs of the ADA qualified individual.

4.185 In the simplest terms, an ADA qualified individual cannot be put into a “health plan” if they do not want to be put there, but this was ignored.

4.186 Initially Los Angeles county interpreted Olmstead as meaning this and would not place ADA qualified individuals into health plans for Medi-Cal and would allow them to continue “fee for service”; then as more and more counties began to get Medicaid waivers for health plan concoctions, and no one brought a challenge to the Olmstead issue, in 2012 the State of California ordered managed care statewide in violation of Olmstead also.

4.187 Burgess’s experiences with how this transgression works for an amputee at least in found in his visit to the IHHI Western Medical Center emergency room where he was denied access to his Orthopedic surgeon referral by a

1 young general practitioner who really had no clue about amputee issues.

2
3 4.188 Letters were sent and ignored asking for same and his x-Ray images.

4
5 4.189 This is Medical Malpractice, Negligence and Fraud all presented in one
6 felt swoop in the name of “managed care” and holding down costs, already
7 declared unlawful for ADA qualified individuals in Olmstead in 1999

8
9 4.190 Subsequent follow up letters requesting same were ignored.

10
11 4.191 The correspondence is attached as **EXHIBIT D, E and F**

12
13 **BURGESS’S eBay, PAYPAL AND ALIEXPRESS EXPERIENCES**

14
15 4.192 Some of Plaintiff Burgess’s experiences are incorporated into the complaint
16 to illustrate the core issues of the causes of action

17
18 4.193 In another example Burgess listed an ADA Custom Handicap Clutch
19 Vehicle Hand control on eBay, and buyer after purchasing damaged the item
20 and then filed a claim to return it, claiming it arrived damaged, after first
21 admitting he was the one who damaged same, and the item being “custom”.

22
23 4.194 After putting Burgess thorough a Buyer Protection Case anyway – even
24 though it was a “custom item” not entitled to same; and ruling against Burgess
25 in which PayPal charged back the funds from his PayPal account even though
26 the item was returned damaged, a letter to PayPal as a claim for the damaged
27 item returned to him and the interference which is **EXHIBIT R**, PayPal
28 reversed themselves and refunded the money back to Burgess, but as an ADA

1 person selling on eBay, under California law he had a right to enjoy the
 2 protection the California Uniform Commercial Code offered at especially 2313
 3 which provided that no warranty was provided which the listing said; and that
 4 special skill would be required depending the vehicle to which it would be
 5 installed to get it working properly, eBay and PayPal interfered anyway.

6
 7 4.195 Burgess's **EXHIBIT NINE MC036 eBay Listing that was Removed:**
 8 **Medical and Prescription Items (426349225)** - eBay item 170501441697 -
 9 Complete carbon fiber socket kit 4 prosthetic leg knee, was nothing more than
 10 a collection of the materials needed, and a video on artisan techniques mashed
 11 up together on how to, build one's own socket, yet eBay claimed it was a
 12 prescription item, at the complaint obviously of a discriminator who did not
 13 want an ADA person to have the information and materials to build their own
 14 socket and free themselves from the extortion of the prosthetics industry and
 15 that is where the principles of self reliance outlined in Olmstead meet the
 16 prosthetics industry and defendants marketing models and manners and failure
 17 to address the law at 42 USC 12182 and Federal Regulations on the issue.

18
 19 4.196 So, in summary an ADA person can buy all the materials they need to build
 20 their own prosthetic but the parts to use for the actual working pieces of it.

21
 22 4.197 The five major prosthetics manufacturers, defendants OTTO BOCK,
 23 ENDOLITE, OSSUR, FILLAUER, and TRULIFE have all put MPC knees in
 24 the market misbranded claiming a prescription was needed per 21 USC 331(a)

25
 26 4.198 eBay and PayPal treat ADA persons as though they do not exist and to
 27 discriminate against them is their open policy as though they are the same as all
 28 others on the eBay sites when in fact extended forms of law protects some the

ADA members actions as to both buying and selling that eBay ignores.

V. FIRST CAUSE OF ACTION

(For violations of Title III of the Americans with Disabilities Act (42 U.S.C. § 12181,et seq.); as amended as to “discrimination and reasonable accommodations” in commerce as to ALL DEFENDANTS)

5.1 Plaintiff brings forth the previous paragraphs here as if fully set forth.

5.2 21 CFR 820.198 and 21 CFR 820.200 create public policy contracts of duties to those who manufacture and / or sell medical devices, including external prosthetic devices to service and support those devices if they manufacture or sell them as to maintain safe use of the device for the consuming public.

5.3 Plaintiffs are ADA Act (ACT) qualified disabled individuals as amputees of Title 42 USC, Chapter 126, §12102 of the Americans with Disabilities Act of 1990, now aware of a ADA discriminatory “no sales and no-ship” policy.

5.4 *For instance* , plaintiff Burgess created a lawful contract with Endolite via the exchange of email under with a fax quote shown as **EXHIBIT O** which creates a binding electronic contract between plaintiff and Endolite pursuant to *Campbell v. General Dynamics Government Systems Corp.*, [407 F.3d 546](#) (1st Cir. May 23, 2005) [citing the e-sign act - 15 USC 7001(a)] in that:

Notwithstanding any statute, regulation, or other rule of law (other than this subchapter and subchapter II of this chapter), with respect to any transaction in or affecting interstate or foreign commerce — (1) a

signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form.

5.5 Pursuant to the Code of Federal Regulations, Title 21, Volume 8, Revised as of April 1, 2010 [CITED AS: 21CFR890.3420] External Prosthetic devices are EXEMPT from regulation under the FDA, by the Federal Food, Drug, and Cosmetic Act (FD&C Act) are NOT regulated by the FDA or restricted to be shipped only to approved medical facilities, or professionals and refusal to sell these items to members of the General Public and ESPECIALLY to ADA Act individuals – if they were prostheticists would not be able to receive them as they are NOT considered Medical Professionals.

5.6 Pursuant to Title 42 USC, Chapter 126, §12182(b)(1)(B) which reads “Integrated settings. Goods, services, facilities, privileges, advantages, and accommodations shall be afforded to an individual with a disability in the most integrated setting appropriate to the needs of the individual.”; thus no amputee can be forced to visit a non-medical practitioner if they want to adjust and service their own prosthetic item themselves.

5.7 Specifically Title 42 USC, Chapter 126, §12182(b)(2) reads “Specific prohibitions.”, as thus:

(A) Discrimination. For purposes of subsection (a), discrimination includes:

(i) the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any **goods**, services, facilities . . .

5.8 Because NO ITEM sold by ENDOLITE, OTTO BOCK, OSSUR, FILLAUER or TRULIFE, or any person in the O & P profession with, using or vending a

category device to 21 CFR 890.3420 is regulated to require installation by ANYONE; and, to put such “imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities” from receiving the very item they need is absolutely discrimination under the ADA Act.

5.9 To require an individual with a disability be locked into a healthcare plan or provision forcing them be able to receive the service or item ONLY at a care plan approved facility where the individual does not want to go, is a violation of the ACT pursuant to *OLMSTEAD V. L. C.* (98-536) [527 U.S. 581](#) (1999) 138 F.3d 893, using a segregated distribution of services. *Townsend*, *supra*

5.10 Further the acts of defendants, and all of them, violate the spirit and intent of [Presidential Executive Order 13217](#) signed June 18, 2001, re: *Olmstead*, and further cause injury in fact by refusing to allow a privilege of the ADA law

5.11 The Defendants have failed to comply with [Presidential Executive Order 13217](#), which has the binding effect of law, addresses this kind of scenario discrimination, as that order specially at Section (1) Policy at (e) states:

“The Federal Government must assist States and localities to implement swiftly the Olmstead decision, so as **to help ensure that all Americans** have the opportunity to live close to their families and friends, to live more independently, to engage in productive employment, and to participate in community life.” [emphasis added]

Thus Defendants’ arguments can also in no way reverse an Executive Order.

5.12 The Olmstead ruling was one about choice for ADA qualified individuals to make choices for themselves absent discrimination from others trying to decide things for them or keep things from them, and defendants Health net and IHHL have illustrated how the cornerstone language of the Supreme Courts' Olmstead ruling is found also in 42 USC 12182(b)(1)(B) Integrated settings:

Goods, services, facilities, privileges, advantages, and accommodations shall be afforded to an individual with a disability in the most integrated setting appropriate to the needs of the individual.

Thus a 42 USC 12182 violation is also an Olmstead violation.

5.13 There is no adequate or speedy remedy at law for the Defendants conduct described above. Because Defendants' discriminatory conduct is ongoing, declaratory and injunctive relief against the Defendants are appropriate pursuant to 42 U.S.C. § 12188(a)(1) as well as attorneys fees per the statute.

VI. SECOND CAUSE OF ACTION

(For Unruh Civil Rights Act (Cal. Civ Code § 51, et seq.); and under 21 USC 331(a) for "Misbranding" Against Defendants

6.1 Plaintiff brings forward all previous paragraphs as if fully set forth.

6.2 Defendants OTTO BOCK, ENDOLITE, OSSUR, FILLAUER, and TRULIFE have placed into the marketplace and interstate commerce medical devices which are fraudulently "misbranded" as defined at 21 USC 331(a) that do not work as advertised or claimed, also claiming to require prescriptions to purchase them, when no such thing is true and have dangerous flaws the

1 manufacturers knew existed at the time of release and did not disclose these
2 flaws and in fact misrepresented the flaws to conceal them.

3
4 6.3 21 USC 332 defines the US District Courts as the venue of adjudication and
5 jurisdiction over claims under 21 USC 331 et seq. as §332. Injunction
6 proceedings that the district courts of the United States and the United States
7 courts of the Territories shall have jurisdiction, for cause shown to restrain
8 violations of section 331 of this title, except paragraphs (h), (i), and (j) and that
9 in case of violation of an injunction or restraining order issued under this
10 section, which also constitutes a violation of this chapter, trial shall be by the
11 court, or, upon demand of the accused, by a jury.

12
13 6.4 “Misbranding” in this case is an ADA 42 USC 12182 violation by refusing to
14 sell.

15
16 6.5 At all times relevant to this action, Plaintiffs were all American ADA citizens.

17
18 6.6 Plaintiffs all have a disability in being leg amputees that substantially limits
19 any ability to ordinary mobility absent assistive prosthetic aid devices.

20
21 6.7 The Defendants have failed to provide reasonable accommodations by
22 modifying their policies, and these are violations of the ADA.

23
24 6.8 The Defendants are excluding and/or discriminating against. Plaintiff solely
25 on the basis of his disability in a stereotype of believing and insisting they are
26 too stupid to set up a simple item themselves they wear every day.

27
28 6.9 As a result of this behavior, Plaintiff s have suffered and will continue to

suffer extreme hardship and actual and impending irreparable harm.

6.10 Plaintiffs are entitled to declaratory and injunctive relief. Plaintiffs are also entitled to recover reasonable attorneys' fees and costs.

6.11 Plaintiffs have in the past requested be allowed to obtain parts directly they may install and save themselves future funds levied.

6.12 There is no adequate or speedy remedy at law for the Defendants conduct described above. Because Defendants' discriminatory conduct is ongoing, declaratory and injunctive relief against the Defendants are appropriate pursuant to 42 U.S.C. § 12133.

6.13 Plaintiff is also entitled to recover reasonable attorneys' fees and costs incurred in bringing this action pursuant to 42 U.S.C. § 12205.

VII. THIRD CAUSE OF ACTION

California Disabled Persons Act (Cal. Civ. Code §54, et seq.);

7 .

7.1 Plaintiff realleges and incorporates the previous paragraphs as though fully set forth herein.

7.2 Defendants all operate a "public place" within the meaning of Section 54.1.

7.3 Defendants utilize certified practitioners as agents of their marketing models

7.4 Defendants have violated law within the meaning of Section 54.1(d).

1 7.5 Defendants are violating Plaintiff's right to full and equal rights under 54.3

2
3 7.6 By violating the ADA, as set forth above, the Defendants have also violated
4 the California Disabled Persons Act.

5
6 7.7 *As an example of how the failure to sell axiom operates* conspiratorially and
7 unlawfully the following facts apply in illustration.

8
9 7.8 January 13, 2011, defendant ENDOLITE falsely and fraudulently represented
10 to plaintiff that they would perform the work shown in **EXHIBIT O**.

11
12 7.9 On or about January 19, 2011, NUNEZ had an unauthorized telephone
13 disclosure pursuant to his limitations of leading ENDOLITE to repudiate and
14 breach the agreement based on whatever NUNEZ said.

15
16 7.10 It is on reason and belief according to NUNEZ that when he stated the knee
17 was for a new patient, the discussion flavored toward wants of breach.

18
19 7.11 ENDOLITE did not want to sell a \$15,000 item, by upgrading an existing
20 knee of which the design frame has not changed since its first AP build in 1998

21
22 7.12 ENDOLITE's promise of January 13, 2011 was indeed thus false.

23
24 7.13 When the defendants both made these representations NUNEZ and
25 ENDOLITE knew them to be false, and these representations were made by
26 defendant with the intent to defraud and deceive plaintiff and with the intent to
27 induce plaintiff to act in the manner herein alleged and not be allowed to get
28 his work done and sale completed.

1
2 7.14 The representations made by defendants NUNEZ and ENDOLITE were in
3 fact false. The true facts were NUNEZ did all he could to gain possession of
4 the AP knee without fully paying for it, and as using ENDOLITE, sought to
5 manipulate them to do so, but in this case ENDOLITE upon discovering the
6 work they promised to perform would produce basically a low cost knee for a
7 new patient, reneged and breached the agreement directly and consciously.

8
9 7.15 At the time defendant NUNEZ made the initial promises to plaintiff which
10 comprised the Quid Pro Quo, to get plaintiff a replacement AP knee defendant
11 NUNEZ had no intention of performing in a manner to allow the entire
12 arrangement to be completed.

13
14 7.16 Plaintiff, at the time these representations were made by defendant and at
15 the time plaintiff took the actions herein alleged, was ignorant of the falsity of
16 defendant's sociopathic and narcissistic representations believing them true.

17
18 7.17 Plaintiff, at the time this promise was made and at the time plaintiff took the
19 actions herein alleged, was ignorant of defendant's secret intention not to
20 perform and plaintiff could not, in the exercise of reasonable diligence, have
21 discovered defendant's secret intention.

22
23 7.18 In reliance on these representations, plaintiff was induced to and did
24 perform work beyond that agreed to on the promise he could be paid or re-
25 compensated for but had plaintiff known of the actual intention of defendant(s)
26 plaintiff would not have taken such action. Plaintiff's reliance on defendant(s)
27 representations was justified because they seemed trustworthy in writing.

1 7.19 Plaintiff has no adequate or speedy remedy at law for the Defendants
2 conduct described above. Because the discriminatory conduct is ongoing,
3 Plaintiff is entitled to declaratory and injunctive relief. Plaintiff is also entitled
4 to recover his reasonable attorneys' fees and costs.

5
6 7.20 At all times relevant to this action, Plaintiff Burgess in the above example
7 was and is a resident of Orange, California.

8
9 7.21 Plaintiff has a disability in that he is a leg amputee that substantially limits
10 any ability to ordinary mobility absent assistive prosthetic aid devices.

11
12 7.22 The Defendants have failed to provide reasonable accommodations by
13 modifying their policy.

14
15 7.23 The Defendants are excluding and/or discriminating against Plaintiff solely
16 on the basis of his disability in a stereotype of believing and insisting he and
17 his kind are too stupid to set up a simple item they wear everyday.

18
19 7.24 As a result of this behavior, Plaintiff has suffered and will continue to suffer
20 extreme hardship and actual and impending irreparable harm.

21
22 7.25 Plaintiff and nor his kind of what would be the class, have any adequate or
23 speedy remedy at law for the Defendant's conduct described above. Because
24 the District's discriminatory conduct is ongoing

25
26 7.26 Plaintiff is entitled to declaratory and injunctive relief. Plaintiff is also
27 entitled to recover his reasonable attorneys' fees and costs.

VIII. FOURTH CAUSE OF ACTION

Breach of Contract

(as to Defendant eBay and PayPal)

8.

8.1 Plaintiffs incorporate by reference each paragraph set forth above and assert this cause of action on behalf of themselves and on behalf of the Class alleged herein.

8.2 In relation to 21 USC 331(a), eBay and PayPal operate to perpetuate the “misbranding” by allowing the sale of items that are misbranded as 21 USC 331(a) specifically states:

The following acts and the causing thereof are prohibited:

(a) **The introduction or delivery for introduction into interstate commerce** of any food, drug, device, tobacco product, or cosmetic that is adulterated or misbranded.

....

(c) The receipt in interstate commerce of any food, drug, device, tobacco product, or cosmetic that is adulterated or misbranded, **and the delivery or proffered delivery thereof for pay or otherwise.**

8.3 Pursuant to the laws of the State of California, as found applicable in minimum in the Cal. U. Com. Code, at Division 2 and 9, eBay and PayPal have failed to enforce and apply the law of said State as promised in the choice of law proviso of the contract, and further that the general policies practices and procedures of eBay and PayPal have operated instead contrary to said laws and in interference to the rights of the parties under said laws.

8.4 *For instance*, Plaintiff Burgess sold a CUSTOM modified item, had terms in his eBay listings which in addition to stating “no refunds” in the eBay listing

1 selection check box, also at clause eleven stated that no warranty applied as
2 Cal. U. Com. Code at §2313 allows the creation of a warranty and at §2316
3 under California law allows the disclaimer of any implied warranty, yet while
4 promising that California law shall apply, eBay through its BPP case and
5 PayPal through its BPP forced Burgess to accepted returns of the items and
6 tortuously interfering by sending the buyer a return label, and removing the
7 funds from his PayPal account placing a hold on the account from the moment
8 the disputed claim was levied. Similar experiences exist for the other
9 plaintiffs, though not cast in the proper light of California law.

10
11 8.5 Pursuant to the general policy of eBay and PayPal, Plaintiffs and the other
12 members of the Class, individually entered into a contract with eBay entitled
13 "User Agreement" and/or "Agreement".

14
15 8.6 eBay's and PayPal's USER AGREEMENT is not lawful, enforceable, and
16 is not binding upon the Parties, even though it satisfies all the elements
17 necessary for formation of a valid contract.

18
19 8.7 The Plaintiffs and the other Class members have duly executed the
20 AGREEMENT by agreeing to it and have performed it by providing their
21 personal and billing information to eBay.

22
23 8.8 The User Agreement defines the rights and obligations of Defendants and
24 each User member as it relates to the laws of the State of California and thus
25 the breach of contract claim relates to the contract between the user member in
26 the role of a seller and eBay or PayPal, not to seller's buyer.

27
28 8.9 At the time the contract / agreement was entered into by Plaintiffs and eBay

1 and /or PayPal, the AGREEMENT was a contract of adhesion that, as stated
2 above, contained various non-negotiable terms, procedures and programs at
3 the time of inception. These unconscionable and non-negotiable terms are void
4 and unenforceable as being contrary to public policy and statutory law as so
5 stated at Cal. Civ. Code 1608, 1667, 1668 and 1708.

6
7 8.10 Both the User Agreements of eBay and PayPal allow a member to occupy
8 dual roles, in the capacity of consumer or merchant.

9
10 8.11 PayPal has several different types of “accounts”, a consumer account that is
11 limited to a receiving limit of \$500, over a given period of time and then an
12 upgrade to a Premier or Business account that allows an unlimited receiving
13 limit, but also mandates the member link it to a bank account,

14
15 8.12 In creating this upgrade it is a one way transaction and one cannot return to
16 the consumer \$500 limit account, and nor can one have both.

17
18 8.13 According to US District Judge Jeremy Fogel, in his order in Case
19 4:10cv02500 SBA in Document 49 Filed 02/15/11 at Page 8 of 11 at line 4 to
20 6 that “Holders of Premier or Business Accounts are required by the user
21 agreement to “attest that [they] are not establishing [those accounts] primarily
22 for personal, family, or household purposes.” Id. Ex. 1 at 2, § 2.2 (emphasis
23 added). and that this makes the holder of such an account thus ineligible to
24 make a claim or prosecute for Violation of the California Consumer Legal
25 Remedies Act, CAL. Civ. CODE §§ 1750-1784.

26
27 8.14 This requirement above violates Cal. Civ. Code 1608, 1667, 1668 and 1708
28 as by PayPal’s contract to use PayPal services one is forced to use, they can no

1 longer have any advantage in the capacity of a consumer who might purchase
2 anything, and certainly are forced into the role of a business when indeed, it
3 could be one or several transactions as a “hobby” seller that by law does not
4 elevate the user member to the status of a business, yet PayPal’s terms interfere
5 with California law and the user’s right to enjoy any prospective economic
6 advantage or contract with any other.

7
8 8.15 In the role of consumer, the PayPal User agreement can force a member to
9 occupy the legal role of a business at all times and that is absurd.

10
11 8.16 The AGREEMENT allowed Plaintiffs to list and contract with other site
12 members and the general public to sell their products using eBay's website, as
13 well as communicate with consumers regarding their sales as their own
14 business, and the consideration given to eBay was adherence to its rules and
15 regulations, and a percentage of all sales made by Plaintiffs.

16
17 8.17 For instance eBay has a FEEDBACK system and MINIMUM SELLER
18 requirement which would not be conducive to minor sales of prosthetic items,
19 as they are not high volume items and such action violate the ADA to put
20 performance standards on an account not meant to be high volume because of
21 what it sells to a limited ADA community.

22
23 8.18 eBay represents on its website that the MINIMUM SELLER
24 REQUIREMENTS AND THE REQUIREMENTS TO BECOME TOP RATED
25 SELLERS are applicable to all sellers. In addition, eBay represents on its
26 website that all eBay users are expected to minimize the amount of negative
27 and neutral Feedback received. Those web representations constitute the
28 operative contractual documents of eBay's AGREEMENT with its customers,

1 but in fact the seller has no control over these issues.

2
3 8.19 Pursuant to and in reliance on the terms of the AGREEMENT, Plaintiffs and
4 the members of its Class provided the monies, and performed all other
5 conditions, covenants, and promises under the AGREEMENT. Specifically,
6 Plaintiffs made every effort to comply with the MINIMUM SELLER
7 REQUIREMENTS AND THE REQUIREMENTS TO BECOME TOP RATED
8 SELLERS, including, inter alia, making all efforts to provide high level
9 customer service to buyers.

10
11 8.20 Defendant eBay is in breach and interfered with the sellers contracts with
12 buyers and the sellers prospective economic advantages in enacting the
13 provision of the contract pertaining to the MINIMUM SELLER
14 REQUIREMENTS AND THE REQUIREMENTS TO BECOME TOP RATED
15 SELLERS by taking action including, but not limited to:

- 16 a) Indefinitely shutting down Plaintiffs' online stores and businesses for
17 reasons not related to sellers' efforts to comply with the minimum seller
18 requirements;
- 19 b) Refusing to reinstate Plaintiffs' accounts after receiving multiple counter-
20 notices that the negative feedbacks provided by buyers were baseless.
- 21 c) By removing low detailed seller ratings for some sellers and refusing to do
22 so for others;
- 23 d) By freezing DSRs and posting them all in one lump sum on sellers'
24 dashboard to create an unfair surprise for the sellers;
- 25 e) By intentionally manipulating DSR ratings;
- 26 f) Refusing to assist Plaintiffs with the problems they encountered with buyers,
27 as promised and represented by eBay's feedback Policy.
- 28 g) Cutting off Plaintiffs off from all communication with current customers

1 with whom Plaintiffs had already entered into transactions.

2 h) Disallowing and interfering with Plaintiffs completions of their business
3 efforts and procedures with its current customers with orders waiting to be
4 filled.

5 i) Allowing other sellers to unfairly dictate eBay's performance of the
6 AGREEMENT, thus effectively allowing Plaintiffs no remedy.

7
8 8.21 The AGREEMENT, when properly construed under California law for any
9 reasons not found in the Cal. U. Com Code absent a court order²⁷ and Federal
10 law, does not permit eBay to ever suspend Plaintiffs and their class members'
11 accounts in an unreasonable and arbitrary fashion.

12
13 8.22 On the contrary, because they were adhesion contracts, they impose upon
14 eBay a duty to enforce them in a fair and reasonable manner. eBay failed to
15 enforce these contracts in a fair and reasonable manner under the auspices of
16 California legal principles by failing to provide its customers with an
17 opportunity to appeal pursuant to the principles and guidelines of California
18 law found in the Cal. U. Com. Code in minimum, as pursuant to Federal MAIL
19 ORDER RULE regulations of the Federal Trade Commission (FTC) of what
20 were in effect eBay's and PayPal's arbitrary decisions made by parties not
21 licensed to practice law or trained to even understand it supervised by a
22 licensed member of the California Bar, to then to suspend their member
23 customers' accounts whether in a buyer or seller capacity.

24
25
26 ²⁷ [see [Pacific Gas & Electric Co. v. Bear Stearns & Co. (1990) [50 Cal. 3d 1118](#)
27 [270 Cal. Rptr. 1, 791 P.2d 587]] (the only form of interference which is not
28 tortuous is when a court of law is encouraged to adjudicate the matter)

8.23 eBay has failed and refused, and continues to fail and refuse, to perform the conditions of the AGREEMENT on its part, which is reinstatement of Plaintiffs' online accounts, among others. This has caused Plaintiffs and the members of its class to lose millions of dollars in lost sales as well as experience lost investment in eBay's interference to the contract sellers were allowed to make with buyers and towards future sales as prospective economic advantages for the failure to enforce California law.

8.24 As a direct and proximate result of eBay's breach of the AGREEMENT, Plaintiffs are entitled to specific performance of the terms of the AGREEMENT and / or an award of special and exemplary damages in an amount equaling the value of all profits Plaintiffs would have made but for eBay's breach, and interferences including all income and benefit derived therefrom, of which Plaintiffs have been deprived by or on behalf of Defendant eBay and / or PayPal.

8.25 Plaintiffs are also entitled to recover its actual attorneys' fees and costs incurred in relation to this action, according to proof, and for such other and further relief that the court may deem proper

IX. FIFTH CAUSE OF ACTION

Cal. Civ. Code 1750 et seq

9

9.1 Plaintiff brings forth the previous paragraphs here as if fully set forth.

9.2 Plaintiffs and other CLRA Subclass members are consumers within the meaning of the CLRA given that Defendant's business activities involve trade or commerce, are addressed to the consumer market generally, and otherwise

1 implicate consumer protection concerns. Even when selling items via PayPal's
2 Service, Plaintiffs and the CLRA Subclass are consumers of PayPal's payment
3 processing service.

4
5 9.3 Plaintiffs and other CLRA Subclass Members have used the service at least
6 in part to BUY items for personal, family and/or household purposes.

7
8 9.4 Consumers within the meaning of the statute are a "consumer" under the
9 CLRA who is "an individual who seeks or acquires, by purchase or lease, any
10 goods or services for personal, family, or household purposes." CAL.
11 CIV.CODE § 1761(d).

12
13 9.5 A Medical Device is always "for personal, family, or household purposes"

14
15 9.6 Although the Agreement provides that PayPal may require sellers to convert
16 their accounts to business or premier accounts, the Agreement does not require
17 sellers to have such accounts, but does not also ALLOW a seller to have a
18 consumer (under \$500 receiving limit) account either. Section 2.2 of the
19 Agreement provides that holders of business and premier accounts attest that
20 they "are not establishing the account primarily for personal, family or
21 household purposes." The Agreement does not prohibit sellers, even those
22 holding business or premier accounts, from using the Service for personal,
23 family and household uses provided that those uses are not the primary uses of
24 the Service, but again does not allow them to have the other account at the
25 same either. It is a one way conversion.

26
27 9.7 The acts and practices of Defendant as described above were intended to
28 deceive Plaintiff s and the CRLA Subclass members as described herein and

1 have resulted and will result in damages to Plaintiff s and the CLRA Subclass
2 members. These actions violated and continue to violate the CLRA in at least
3 the following respects:

4 (a) In violation of § 1770(a)(5) of the CLRA, Defendant's acts and practices
5 constitute representations that the Service has characteristics, uses and/or
6 benefits which it does not;

7 (b) In violation of § 1770(a)(7) of the CLRA, Defendant's acts and practices
8 constitute representations that the Service is of a particular quality which it is
9 not; and

10 (c) In violation of § 1770(a)(9) of the CLRA, Defendant's acts and practices
11 constitute the advertisement of the service in question without the intent to sell
12 them as advertised forcing one into a Business account posture.

13
14 9.8 By reason of the foregoing, Plaintiffs and the CLRA Subclass members have
15 been irreparably harmed.

16
17 9.9 By committing the acts above, Defendants violated the CLRA.

18
19 9.10 In compliance with the provisions of California Civil Code § 1782, prior to
20 the filing of this complaint, Plaintiffs notified Defendant in writing of the
21 particular violations of § 1770 of the Act and demanded Defendant to rectify
22 the actions described above by modifying their policies. Plaintiffs sent these
23 notices by certified mail, return receipt requested, to Defendant's principal
24 place of business. **EXHIBITS S through CC**

25
26 9.11 Defendants failed to adequately respond to Plaintiffs' demand to rectify the
27 wrongful conduct described above on behalf of all Class members within thirty
28 days after receipt of the § 1782 notice. Accordingly, Plaintiffs now seeks actual

1 and punitive damages against Defendant for violations of the CLRA on behalf
2 of himself and the CLRA Subclass.

3
4 9.12 Plaintiffs and CLRA Subclass members are entitled, pursuant to California
5 Civil Code §§ 1780(a)(2) and (3), to an order: (1) enjoining the above-
6 described wrongful acts and practices; and (2) requiring the payment of
7 restitution to Plaintiff and the Class. Plaintiff and the Class are also entitled to
8 the payment of costs and attorneys' fees and any other relief deemed
9 appropriate and proper by the Court under California Civil Code § 1780(e).

10
11 9.13 WHEREFORE, Plaintiffs and the Class pray for relief further below.

12 13 **X. SIXTH CAUSE OF ACTION**

14 (For Breach of Covenant of Good Faith and
15 Fair Dealing

16
17 10.1 Plaintiff brings forth the previous paragraphs here as if fully set forth

18
19 10.2 California law implies a covenant of good faith and fair dealing in all
20 contracts between parties entered into in the State of California.

21
22 10.3 Defendants, save Norm's, all sell misbranded items in California.

23
24 10.4 For instance in the case of Endolite contract offers were made and were
25 accepted in the State of California, though by electronic means, and thus
26 California law applies

27
28 10.5 For Endolite the offer and acceptance of the Quote of **EXHIBIT O**

constitutes a contract so long as the terms are certain and the amount is tendered. ENDOLITE admitted all this was done and the amount returned. HOWEVER, to refuse the amount tendered does not excuse the breach of contract nor creation of a tort due the breach. See *Erlich v. Menezes*, [21 Cal 4th 543](#), (1999) and in that case the court wrote” An omission to perform a contract obligation is never a tort, unless that omission is also an omission of a legal duty.” (Ibid., quoting *Jones v. Kelly* (1929) 208 Cal. 251, 255 [280 P. 942].)”; and here the legal duty is found in the ADA law.

10.6 As a result of the actions of defendants, both of them, set forth hereinabove, said defendants have violated the implied covenant of good faith and fair dealing contained herein as against said Plaintiff herein, and as a result thereof, Plaintiff is entitled to damages as prayed.

10.7 It is perplexing that the PayPal User Agreement according to Judge Jeremy Fogel, in his order in Case 4:10cv02500SBA in Document 49 Filed 02/15/11 at Page8 of 11 at line 4 to 6 that “Holders of Premier or Business Accounts are required by the user agreement to "attest that [they] are not establishing [those accounts] primarily for personal, family, or household purposes." Id. Ex. 1 at 2, § 2.2 (emphasis added). and that this makes the holder of an account ineligible to make a claim or prosecute for Violation of the California Consumer Legal Remedies Act, CAL. Civ. CODE §§ 1750-1784, but this makes eBay Users “merchants”, but “misbranding” does not discriminate.

10.8 The operand of this would be to limit an ability for a cause of action as this one to be levied upon defendants and is by design drafted in the agreement that way to cause an interference with the enjoyment of State law rights.

1 10.9 Implied in the AGREEMENT between Plaintiffs and eBay was a covenant
2 by eBay that they would act in good faith and fair dealing with Plaintiffs, and
3 would do nothing to interfere with, or to deprive Plaintiffs of the benefits it
4 was entitled to under the AGREEMENT. See Civ. Code 1708

5
6 10.10 Here specific exact language was added to terms of a condition the PayPal
7 user is forced to sign up or on for which limits legal exposure of Defendants
8 by fraudulently causing a waiver to Cal. Civ. Code 1750 et seq.

9
10 10.11 Defendant eBay breached this obligation under the implied covenant,
11 among others, by also:

12 a) Soliciting Plaintiffs with promises of coaching, guidance, assistance and
13 favorable resolution of problems related to its eBay's account if they meet the
14 minimum seller requirements, and then unilaterally, indefinitely shutting
15 down their accounts based on false, unsubstantiated, and contested reasons
16 without giving it any reasonable opportunity to defend itself or protect its
17 business;

18 b) Coaching, advising, and promoting Plaintiffs' sale of items on its platform,
19 and then unilaterally, indefinitely shutting down their accounts for selling
20 these same specialty items based on false, unsubstantiated, and contested
21 reasons, and without giving Plaintiffs any reasonable opportunity to defend
22 itself or protect its business;

23 c) Completely cutting Plaintiffs off from all communication with current
24 customers with whom Plaintiffs had already entered into transactions;

25 d) Allowing third parties (bigger sellers) to unfairly dictate eBay's
26 performance of the AGREEMENT, thus effectively allowing Plaintiffs no
27 remedy;

28 e) by failing to remove baseless and unfounded feedbacks given to Plaintiffs

by buyers; Defendant's breach of the covenant of good faith and fair dealings has caused Plaintiffs unnecessary and unwarranted attorney's fees by obtaining counsel to represent Plaintiffs in the prosecution of this action. At all times herein mentioned, Defendant knew or should have known that Plaintiffs would incur substantial damages in these blatant interferences, when actually the Cal. U. Com. Code applied to these relations, not eBay's arbitrary and capricious creation of "policies" not founded in CA law.

10.12 The conduct of Defendant eBay has been intentional and willful, and has been fraudulent, malicious, and/or oppressive in nature, and Plaintiffs are entitled to exemplary damages in an amount subject to proof at trial.

10.13 Plaintiffs are also entitled to recover its actual attorneys' fees and costs incurred in relation to this action, according to proof, and for such other and further relief that the court may deem proper.

10.14 WHEREFORE, Plaintiffs and the Class pray further for relief as also set forth below.

10.15 Because the Defendants' discriminatory, unlawful and bad faith conduct is ongoing, Plaintiff is entitled to declaratory and injunctive relief. Plaintiff is also entitled to recover his reasonable attorneys' fees and costs.

XI. SEVENTH CAUSE OF ACTION

(For prongs 1, 2 and 3 of the California Unfair Competition Law, B&P 17200 et seq Unfair Business Practices

11

11.1 Plaintiff brings forth all the previous paragraphs here as if fully set forth.

11.2 The Unfair Competition Law ("UCL") prohibits "unfair competition" which is defined as "any unlawful, unfair or fraudulent business act or practice" Cal. Bus. & Prof. Code § 17200. The Legislature intended this "sweeping language" to include "anything that can properly be called a business practice and that at the same time is forbidden by law." *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, [17 Cal. 4th 553](#), 560 (1998) (quoting *Bank of the West v. Sup. Ct.*, [2 Cal. 4th 1254](#), 1266 (1992)). "When determining whether a practice is 'unlawful,' section 17200 'borrows' violations of other laws, and makes them independently actionable under the [UCL]." *Aicco, Inc. v. Ins. Co. of North Am.*, [90 Cal. App. 4th 579](#) (2001) (citing *Cel-Tech*, 20 Cal. 4th at 180). "When a plaintiff who claims to have suffered injury from a direct competitor's 'unfair' act or practice invokes section 17200, the word 'unfair' in that section means conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Cel-Tech*, 20 Cal. 4th 163. But "[v]irtually any law - federal, state or local - can serve as a predicate" for a UCL claim, "unless the defendant is privileged, immunized by another statute, or the predicate statute expressly bars its enforcement" under the UCL. *Stevens v. Sup. Ct.*, [75 Cal. App. 4th 594](#), 602 (1999).

11.3 Using a no-ship policy and false advertising claims of parts and their prosthetic parts and items, defendants promote and promulgate an unlawful ADA segregated distribution model which is designed to circumvent 21 CFR 820 subparts "I" and "J as a "business act or practice" by for example Defendant Blatchford and Nunez to not allow complaints to reach them for Corrective Assessments and Preventative Action (CAPA, ¶ 4.149) and thus

1 in violation of the UCL.

2
3 11.4 Defendant Blatchford fraudulently had posted a page on its website leading
4 customers - wherever they intend to initially get the prosthetic item - to
5 believe they can get service direct from ENDOLITE [Blatchford], but this is
6 not true and ENDOLITE [Blatchford] had no intention of honoring its
7 publicly available online sales claim once a person has the item and needs
8 service or seeks to make a complaint of the item." **EXHIBIT DD**

9
10 11.5 Plaintiff alleges Defendant Blatchford violates the UCL by only selling over
11 the counter non-regulated prosthetic parts and items ONLY to certain non-
12 licensed, non-qualified persons despite statements that make it seem like it
13 sells to everyone.

14
15 11.6 Plaintiff thus alleges a violation of the fraudulent prong of the UCL by an
16 illustrating example through Defendant ENDOLITE [Blatchford] and Nunez.

17
18 11.7 In *Levine v. Blue Shield of California*, [189 Cal.App.4th 1117](#) (Nov. 5, 2010),
19 the Court of Appeal (Fourth Appellate District, Division One) stated without
20 analysis that a UCL "fraudulent" prong claim predicated on an omission (as
21 opposed to an affirmative misrepresentation) does not lie absent a duty to
22 disclose. *Id.* at 1136

23
24 11.8 Plaintiffs also alleges a violation of the unfair prong of the UCL by
25 Defendants OTTO BOCK, ENDOLITE, OSSUR, FILLAUER and TRULIFE

26
27 11.9 In *Rubio v. Capital One Bank*, (No. 08-56544) [613 F.3d 1195](#) (9th Cir.
28 July 21, 2010), the Ninth Circuit addressed UCL standing and held that loss

1 of a line of credit constitutes a loss of money or property sufficient to confer
2 Prop. 64 standing. Slip op. at 10400-01.

3
4 11.10 The *Rubio* court also noted the split in authority on the definition of
5 "unfair," but found it unnecessary to choose between the different definitions
6 because the defendant's conduct was unfair under both. Id. at 10402.

7
8 11.11 In Federal Trade Commission v. Neovi, Inc., (No. 09-55093) [604 F.3d 1150](#)
9 (9th Cir. May 14, 2010), the Ninth Circuit construed the Federal Trade
10 Commission Act, 15 U.S.C. § 45(n). The opinion is an interesting one,
11 especially to the extent that some Court of Appeal panels may be adopting the
12 FTC Act standard as a third formulation of the UCL's "unfair" prong. See,
13 e.g., *Davis v. Ford Motor Credit Co.*, [179 Cal.App.4th 581](#) (2009). But see
14 *Overstock.com, Inc. v. Gradient Analytics, Inc.*, [151 Cal.App.4th 688](#), 715
15 (2007) ("the California UCL contains no directive to interpret our consumer
16 protection statute consistently with the FTC Act").

17
18 Here is a notable passage:

19
20 To support its argument that the FTC's showing of causation was
21 insufficient, Qchex urges us to seek interpretive guidance from
22 several California state cases that were decided under California
23 Business & Professions Code § 17200—the so-called “Little FTC
24 Act.” We decline the invitation. While it is common practice for
25 states with consumer protection statutes modeled on the FTC Act to
26 rely on federal authority when interpreting those statutes, the reverse
27 is not the case. As the FTC points out, given the abundance of state
28 laws on which such interpretations could be based, this practice
would likely result in a sea of inconsistent rulings. See *Orkin
Exterminating Co., Inc. v. FTC*, [849 F.2d 1354](#), 1363 (11th Cir. 1988)
(noting that there is nothing constraining the FTC “to follow judicial
interpretations of state statutes in construing the agency’s section 5

1 authority”).

2
3 11.12 But in *Drum v. San Fernando Valley Bar Association*, [182 Cal.App.4th 247](#)
4 (Feb. 24, 2010), the California Court of Appeal (Second Appellate District,
5 Division Five) upheld a judgment entered after the defendant's demurrer to
6 the plaintiff's UCL claim was sustained without leave to amend. Plaintiff
7 **Drum** was a former attorney and private mediator who sought to buy the San
8 Fernando Valley Bar Association's membership list so that he could market
9 his services to its members. Slip op. at 2. The Association refused to sell it to
10 him, so he filed suit under the UCL seeking a mandatory injunction. Id. The
11 Court of Appeal held (without deciding whether this was a "consumer" or a
12 "competitor" action) that the Association's conduct was not "unfair" under
13 any of the three formulations:

14
15 A voluntary bar association's unilateral refusal to sell its
16 membership list to any particular buyer, even if the association's
17 reason was to protect some of its members from price
18 competition, is not an "unlawful, unfair or fraudulent business act
or practice" under the UCL (§ 17200).

19
20 Id. at 5. The Court of Appeal also observed that plaintiff "did not allege that
21 he lost or expended or was denied any money or property as the result of the
22 Association's refusal to sell him its membership mailing list," and therefore
23 lacked Prop. 64 standing to bring the action. Id. at 4.; however here, plaintiff
24 has lost and expended money and property value and was denied money.

25
26 11.13 Plaintiff thus also alleges a violation of the unlawful prong of the UCL by
27 Defendant Blatchford and Nunez.
28

11.14 By way of the ADA law, the previous allegations of this action brought forward here illustrate the “unlawful prong”

11.15 In *Shroyer v. New Cingular Wireless Services*, [606 F.3d 658](#) (9th Cir. 2010), issued in May and amended in September, in which the Ninth Circuit addressed the UCL's "unlawful" prong:

“In his complaint, Shroyer alleged that New Cingular violated the common law of unfair competition and breached his contract. These practices alone do not amount to a violation of the “unlawful” prong of § 17200; Shroyer must also allege that New Cingular engaged in a business practice “forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court-made.” *Saunders v. Superior Court*, 27 Cal. App. 4th 832, 838-39 (Cal. Ct. App. 1994). In other words, a common law violation such as breach of contract is insufficient. See *Allied Grape Growers v. Bronco Wine Co.*, 203 Cal. App. 3d 432, 450-54 (Cal. Ct. App. 1988) (finding a § 17200 violation only after finding three violations of the California Food and Agriculture Code); see also *Nat’l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 319 F. Supp. 2d 1059, 1074-75 (C.D. Cal. 2003) (holding that a violation of common law can support a § 17200 claim, provided that the conduct is also unlawful, unfair, or fraudulent).”

Here however, both Defendants have violated all three prongs in that the conduct is also unlawful, unfair, and fraudulent

11.16 The California Supreme court at the request of the Ninth circuit addressed this as thus in *Munson v Del Taco* [46 Cal.4th 661](#), (6/11/09):

“Assuming all other requirements for such an action were met, therefore, violations of the ADA’s accessibility mandate, whether involving intentional discrimination or not, would be remediable through Business and Professions Code sections 17200 and

17203.”

11.17 Defendants have violated California Business and Professions Code 17200 et seq. by consummating an unlawful, unfair, and fraudulent business practice, designed to deprive plaintiff of his prospective economic advantage of his HPC product line defendant knew depended on being able to get this work done as agreed and it would affect direct delivery to an ADA person.

11.18 By reason of the foregoing, Plaintiffs have suffered and continues to suffer damages in a sum which is, as yet unascertained. Plaintiffs will ask leave of court to amend complaint when the true nature and extent of the damages have been ascertained.

11.19 Plaintiff shows by affidavit attached, and reference to the relevant sections of this complaint the known extent of damages thus far.

11.20 ENDOLITE had fraudulently posted a page on its website leading customers – wherever they intend to initially get the prosthetic item - to believe they can get service direct from ENDOLITE, but this not true and ENDOLITE has no intention on honoring its publicly available online sales claim once a person has the item and needs service or seeks to make a complaint of the item. See **EXHIBIT DD**. This also violates the requirements of 21 CFR 820 et seq as to “CAPA” complaints.

11.21 ENDOLITE has known their Adaptive knee was designed properly nor worked as promoted, and now are rushing to bring to market one that allegedly does work as the C-Leg always did; they now call the ORION knee, but the truth is both knees are defectively designed as to current technology

11.22 Because the Defendants' discriminatory conduct is ongoing, Plaintiff is entitled to declaratory and injunctive relief. Plaintiff is also entitled to recover his reasonable attorneys' fees and costs.

XII. EIGHTH CAUSE OF ACTION

(For Intentional Interference with Prospective Economic Advantage

12

12.1 Plaintiff brings forth the previous paragraphs here as if fully set forth.

12.2 The elements of the tort of Intentional Interference with Prospective Economic Advantage are:

"(1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff;

(2) the defendant's knowledge of the relationship;

(3) specific intent is not a required element of the tort of interference with prospective economic advantage. While a plaintiff may satisfy the intent requirement by pleading specific intent, i.e., that the defendant desired to interfere with the plaintiffs prospective economic advantage, a plaintiff may alternately plead that the defendant knew that the interference was certain or substantially certain to occur as a result of its action.

(4) actual disruption of the relationship; and

(5) economic harm to the plaintiff proximately caused by the acts of the defendant."

Korea Supply Co. v. Lockheed Martin Corp., 131 Cal.Rptr.2d 29 (2003); 29 Cal.4th 1134, 63 P.3d 937

12.3 Here Defendants interfere with the ability of plaintiff sell or re-sell there

1 personal property by making parts and items needed unavailable to them to
2 complete their advantage to sell or re-sell the items and “knew that the
3 interference was certain or substantially certain to occur as a result of its
4 action” in complete indifference to the circumstances in depriving plaintiff of
5 known business funding, defendant required the account opened and titled as,
6 all five prongs are met.

7
8 12.4 Intentional interference with prospective economic advantage requires
9 proof of the following: (1) the existence of an economic relationship between
10 plaintiff and the third party; (2) defendant's knowledge of the existence of the
11 relationship; (3) defendant intentionally engaged in acts or conduct that was
12 intended to disrupt the economic relationship; (4) actual disruption of the
13 relationship; (5) plaintiff suffered damages as a result. *Steinberg Moorad &*
14 *Dunn, Inc. v. Dunn*, Case No. CV 01-07009 RSWL (RZX), 2002 WL
15 31968234, at *24 (C.D. Cal. Dec. 26, 2002.)

16
17 12.5 As an example Defendant Endolite [Blatchford] interfered in plaintiff's
18 economic relationship with Nunez.

19
20 12.6 Nunez interfered in plaintiff's economic relationship with Defendant
21 Blatchford.

22
23 12.7 Blatchford know of the relationship and in fact confused it as being
24 something it was not – and employee – employer relationship.

25
26 12.8 When Blatchford discovered the true relationship they refused to do business
27 further causing disruption in the relationship.

1 12.9 Blatchford caused a disruption in plaintiff's economic advantage by
2 speaking with non-HPC personnel and confused them (her) without any
3 authority to do so and thus "induced the breach of contract" of Blatchford.

4
5 12.10 Plaintiff Burgess was just starting out to build an enterprise in which future
6 economic benefit of a good relationship would be ongoing. As NUNEZ's
7 credit was bad, plaintiff has set up his own immediate pay "cash accounts" to
8 alleviate strain on the relevant firms for future sales.

9
10 12.11 Blatchford in turn caused the disruption to the relationship with Nunez

11
12 12.12 The elements of that tort of are: '(1) an economic relationship between [the
13 plaintiff and some third person] containing the probability of future economic
14 benefit to the [plaintiff], (2) knowledge by the defendant of the existence of
15 the relationship, (3) intentional acts on the part of the defendant designed to
16 disrupt the relationship, (4) actual disruption of the relationship, [and] (5)
17 damages to the plaintiff proximately caused by the acts of the defendant.'
18 (*Buckaloo v. Johnson* (1975) 14 Cal.3d 815, 827.)

19
20 12.13 Plaintiff Burgess owns the Adeptprostheics.info and Adeptprosthetics.com
21 domains, thus Adeptprosthetic.info IS HPC Manufacturing.

22
23 12.14 The tort of Intentional Interference with Prospective Economic Advantage
24 is the broader of the two so-called interference torts. The other is interference
25 with contract. The tort of 'interference with contractual relations has its roots
26 in the tort of 'inducing breach of contract.'" (*Seaman's Direct Buying Service*
27 *Inc. v. Standard Oil Co.* (1984) [36 Cal.3d 752](#), 765.) The latter is merely a
28 species of the former. The principal difference between them is that 'the

1 existence of a legally binding agreement is not a sine qua non to the
 2 maintenance of a suit based on the more inclusive wrong.' (*Buckaloo*, supra,
 3 at 823.) 'Both the tort of interference with contract relations and the tort of
 4 interference with prospective contract or business relations involve basically
 5 the same conduct on the part of the tortfeasor. In one case the interference
 6 takes place when a contract is already in existence, in the other, when a
 7 contract would, with certainty, have been consummated but for the conduct of
 8 the tortfeasor. . . . Rather than characterizing the two as separate torts, the
 9 more rational approach seems to be that the basic tort of interference with
 10 economic relations can be established by showing, inter alia, an interference
 11 with an existing contract or a contract which is certain to be consummated,
 12 with broader grounds for justification of the interference where the latter
 13 situation is presented.' (*Builders Corporation of America v. U.S.*
 14 (N.D.Cal.'57) 148 F.Supp. 482, 484, fn. 1, revd. on other grounds (9th Cir.'58)
 15 259 F.2d 766, see also *Pacific Gas & Electric Co. v. Bear Stearns &*
 16 *Co.*(1990) 50 Cal.3d 1118, 1126.)

17
 18 12.15 Because the Defendants' discriminatory conduct is ongoing, Plaintiff is
 19 entitled to declaratory and injunctive relief. Plaintiff is also entitled to recover
 20 his reasonable attorneys' fees and costs.

21 22 **XIII. NINTH CAUSE OF ACTION**

23 (For Fraud as to OTTO BOCK, ENDOLITE and ALIEXPRESS)

24 13

25 13.1 Plaintiff brings forth the previous paragraphs here as if fully set forth.

26
 27 13.2 Defendants have negligently violated their duties to operate in a
 28 discrimination-free manner in accord law and professional responsibility.

1
2 13.3 Defendants have a moral and legal a duty to operate in a manner that is free
3 from unlawful discrimination, and to hire, train, supervise, and discipline their
4 employees and one another to fulfill that duty. Defendants negligently
5 violated that duty by discriminating against Plaintiff with policy against on
6 account of his disability. The ways that Defendants violated that duty include,
7 but are not limited to, negligently failing to train their employees and one
8 another regarding the requirements of federal and state disability rights laws,
9 negligently failing to hire persons who were familiar with the requirements of
10 federal and state disability rights laws, negligently failing to supervise
11 employees and agents regarding compliance with state and federal disability
12 rights laws, and negligently failing to discipline or terminate employees who
13 did not comply with the federal and state disability rights laws.

14
15 13.4 Defendant ALIEXPRESS makes representations on its website as to a
16 “Buyer Protection Program” it does not honor, it confuses the fact it is the
17 seller in their setup and by their own admission in their own documents and
18 Aliexpress offers for sale medical device prosthetic items which are not
19 adequately described and are thus misbranded in their offer for sale as shown
20 in the documentation of **Exhibit CC**.

21
22 13.5 **Exhibit CC** references one of four “buyer protection” cases filed which do
23 not honor the “full refund and keep the item” promise, and the item sold was
24 one for medical uses to an ADA qualified individual, and the prosthetic item
25 of **Exhibit CC** is misbranded as to what it does and what the sale includes.

26
27 13.6 Because the Defendants’ discriminatory conduct is ongoing, Plaintiff is
28 entitled to declaratory and injunctive relief. Plaintiff is also entitled to recover

his reasonable attorneys' fees and costs.

XIV. TENTH CAUSE OF ACTION

(Fraud)

14

14.1 Plaintiff brings forth the previous paragraphs here as if fully set forth.

14.2 Specific performance requires the existence of a contract, that created when ENDOLITE replied with a fax quote shown as **EXHIBIT O** which creates a binding electronic contract between plaintiff and Endolite pursuant to *Campbell v. General Dynamics Government Systems Corp.*, 407 F.3d 546 (1st Cir. May 23, 2005) [citing the e-sign act - 15 USC 7001(a)] in that:

Notwithstanding any statute, regulation, or other rule of law (other than this subchapter and subchapter II of this chapter), with respect to any transaction in or affecting interstate or foreign commerce — (1) a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form.

14.3 The terms were specific and certain as to model, shipping and work.

14.4 California Civil Code § 3390(5), an "agreement, the terms of which are not sufficiently certain to make the precise act which is to be done clearly ascertainable," cannot be specifically enforced thus does not apply

14.5 Despite Plaintiff's compliance, ENDOLITE informed Plaintiff they would be breaching on January 27, 2011 and in fact did so. (**EXHIBIT EE**) There is a four year statute of limitation on contract matters in California.

1 14.6 As shown heretofore, Plaintiff Burgess had performed all of the conditions
2 of the contract that are required to be performed by plaintiff Burgess.

3
4 14.7 Plaintiff Burgess remains ready to perform all terms of the agreement
5 applicable to plaintiff Burgess and to receive the goods and services as
6 promised by defendants.

7
8 14.8 Plaintiff has no remedy at law because the contract described herein was a
9 contract for the sale of specific peculiar property, and pursuant to Civil Code
10 section 3386 money damages are presumed inadequate for its breach.

11
12 14.9 Plaintiff has been harmed because he has a separate contract ENDOLITE has
13 now interfered with in which plaintiff Burgess licensed the item for use.

14
15 14.10 Because the Defendants' discriminatory conduct is ongoing, Plaintiff is
16 entitled to declaratory and injunctive relief. Plaintiff is also entitled to recover
17 his reasonable attorneys' fees and costs.

18
19
20 **XV. ELEVENTH CAUSE OF ACTION**

21 (Negligence as to Otto Bock)

22 15

23 15.1 Plaintiff brings forth the previous paragraphs here as if fully set forth.

24
25 15.2 Defendant Otto Bock is now, and at all times mentioned in this complaint
26 was, in the business of designing, manufacturing, constructing, assembling,
27 inspecting, and selling various types of modular prosthetic limb devices
28 including prosthetics knees and the especially the C-leg system consisting of

1 a mandated knee, pylon and foot of exclusively an Otto Bock model make.

2
3 15.3 In 2010, plaintiff Burgess purchased an assembled Otto Bock C-Leg
4 system, which he mounted on his personal socket and it worked fine until
5 early 2013 when Burgess surmised the battery in the C-leg needed replacing
6

7 15.4 In July 2013, plaintiff attempted to obtain replacement instructions from
8 Otto Bock, and he was met with stonewalling and run-around, at which time it
9 malfunctioned losing all hydraulic support contributing to and causing the
10 injuries and damages described herein.
11

12 15.5 At all times mentioned in this complaint, defendant Otto Bock so
13 negligently and carelessly designed, manufactured, constructed, assembled,
14 inspected, and sold the C-Leg system – misleading the wearers and general
15 public into believing it was a hydraulic knee system when indeed it was only
16 a powered hydraulic system and without battery power, it offered no support
17 at all and was thus dangerous and unsafe for its intended uses.
18

19 15.6 At all times mentioned in this complaint, defendant Otto Bock mislead the
20 general public, the wearers of the item and the FDA as to its safety so
21 negligently and carelessly inspected, maintained, installed, and sold the c-Leg
22 in full knowledge of this contrived a warranty program to cover and hide this
23 defect anyone would have discovered had they removed the battery revealing
24 that it was dangerous and unsafe for its intended uses.
25

26 15.7 As a direct and proximate result of the negligence and carelessness of
27 defendants as described above, the C-Leg purchased by plaintiff Burgess has
28 become worthless and fearful to be used by plaintiff Burgess.

1
2 15.8 As a further direct and proximate result of the negligence and carelessness
3 of defendants as described above, plaintiff sustained the following serious
4 injuries and damages in a fall at Norms Restaurant – while no caused by the
5 C-Leg was contributed to because of the walking style plaintiff burgess had to
6 maintain to walk more safely in the C-Leg of keeping the leg stiff and
7 preventing the knee fro bending so as go out from under him at any moment,
8 which has resulted in permanent soft tissue injury to his residual limb leaving
9 him in, pain and suffering, further permanent disability, and expecting
10 medical expenses to repair the nerve and tissue injury special to amputees.
11

12 15.9 WHEREFORE, plaintiff demands judgment as set forth below.
13
14

15 **XVI. TWELFTH CAUSE OF ACTION**

16 (Strict Products Liability as to Otto Bock)
17

18 16

19 16.1 Plaintiff incorporates by this reference all previous allegations contained
20 herein this complaint, as though fully set forth here.

21 16.2 At all times mentioned in this complaint, the C-Leg system and its
22 component parts were defective as to design, manufacture, and having
23 misbranded warnings, causing the C-Leg and its component parts to be
24 advertised and sold in a dangerous and defective condition that made them
25 unsafe for their intended use.
26

27 16.3 At no time and in no literature were persons ever advised or warned that loss
28 of power would result in loss of support in that the C-Leg was a powered

1 hydraulic solution leg only.

2
3 16.4 As a direct and proximate result of the defective and dangerous condition
4 of the C-Leg described above, plaintiff has suffered damaged in loss of value
5 and ability to re-sell the item.

6
7 16.5 As a further direct and proximate result of the defective and dangerous
8 condition of the oven described above, plaintiff Burgess has sustained the
9 injuries and damages yet to be ascertained when defendants Health Het and
10 IHHI are ordered to cease the Olmstead violation and allow Burgess to be
11 examined for all injuries relevant to an amputee by his Physician of choice

12 13 14 **XVII. THIRTEENTH CAUSE OF ACTION**

15 (Negligence – Slip and Fall as to Norm's Restaurants)

16 17

17 17.1 Plaintiff brings forth the previous paragraphs here as if fully set forth.

18
19 17.2 That on or about November 25, 2013, the Plaintiff was walking on common
20 property on the premises owned and managed by the Defendant Norms and he
21 fell as described in **Exhibit I**

22
23 17.3 Prior to his fall, Defendant had re-tiled the floor with smooth shiny glazed
24 ceramic tile that violations the ADAAG (Americans with Disabilities Act
25 Accessibilities Guidelines) of the USDOJ, and then placed a rubber mat on a
26 wet floor over the floor at the door they also kept waxed.

27
28 17.4 Solely as a result of the failure of the Defendant to properly follow the law

1 and the ADAAG in all common areas, Plaintiff Burgess sustained serious and
 2 severe injuries to his person, including, but not limited to, the following
 3 injuries: contusions to her right arm;; soreness in right shoulder; post-
 4 traumatic pain in right shoulder, arm, and wrist; soft tissue injuries to his
 5 amputated left leg residual limb of a nature that does not heal naturally,
 6 anxiety; and other serious and severe personal injuries.

7
 8 17.5 Solely as a result of the injuries aforementioned, Plaintiff Burgess has
 9 incurred damages, including:

10 a. Medical expenses;

11 b. Lost wages;

12 c. He has, may, and probably will for an indefinite time in the future suffer
 13 great pain, inconvenience, embarrassment, and mental anguish;

14 d. He has, may, and probably will for an indefinite time in the future be
 15 deprived of ordinary pleasures of life, loss of well-being, and equanimity; and

16 e. His overall health, strength, and vitality has been greatly impaired.
 17

18 17.6 The aforesaid incident occurred as a result of and was proximately caused
 19 by the careless, negligent, grossly careless, and reckless conduct of the
 20 Defendant, Norm's Restaurants Inc., which consisted inter alia of the
 21 following particulars:

22
 23 a. Failing to properly supervise the common areas in question so as to furnish
 24 to the Plaintiff Burgess and all ADA qualified persons, a safe and properly
 25 slip resistant walkway, free from hazards which were recognized or should
 26 have been recognized by Defendant, as causing or likely to cause the serious
 27 physical harm to the Plaintiff, and others;

28 b. Failing to maintain the common area in a safe condition to insure that the

1 Plaintiff would not be caused to slip and fall as a result of the waxing of the
2 floor which were known and should have been known to the Defendant;

3 c. Failing to properly inspect the common area walkway wherein the Plaintiff
4 was caused to fall as a result of placing a small mat on a wet floor;

5 d. Failing to maintain the premises owned by the Defendant Norm's in good
6 and safe condition for the Plaintiff and others;

7 e. Failing otherwise to comply with the applicable laws and regulations of the
8 State of California and the applicable USDOJ ADAAG Federal laws and
9 regulations;

10 f. Otherwise failing to exercise the degree of care required under the
11 circumstances; and

12 g. Otherwise being negligent.

13
14 17.7 As a result of the aforesaid conduct and breach of care of the Defendant
15 Norm's, Plaintiff Burgess sustained the injuries, losses, and damages which
16 were more fully described above, without any negligence of the Plaintiff
17 contributing thereto.

18
19
20
21 **PRAYER FOR RELIEF**

22 **WHEREFORE**, on behalf of themselves and the Class defined herein,
23 Plaintiffs pray for judgment as follows:

24 a. For an order certifying the Class and appointing Plaintiffs and their
25 counsel to lead counsel to represent the Class;

26 b. For an order awarding Plaintiffs and the members of their Class treble,
27 statutory and punitive damages, together with interest thereon;

28 c. For an order awarding Plaintiffs and the members of their Class

1 compensatory damages in an amount which may be proven at trial, together
2 with interest thereon;

3 d. For an order awarding Plaintiffs and the members of their Class
4 restitution of all monies acquired by Defendants from Plaintiffs, the Class,
5 and the general public, as a result of Defendants' wrongful practices
6 described above;

7 e. For an order awarding Plaintiff and the members of their Class pre-
8 judgment and post-judgment interest, as well as their reasonable attorneys'
9 and experts' witness fees and other costs;

10 f. For an order or judgment finding the arbitration provision in Defendants'
11 Used Agreements to be unenforceable;

12 g. For an order imposing a constructive trust upon all monies and assets
13 Defendant have acquired from Plaintiffs and the members of their Class as a
14 result of Defendants' unlawful, unfair, fraudulent, and deceptive practices;

15 h. For an order awarding Plaintiff and all other similarly situated individuals
16 equitable and declaratory relief, as the Court deems appropriate;

17 i. In the event of a default for an order of 5 million dollars to be distributed
18 as a cy pres award among the class after actual claimed costs are distributed
19 to the named plaintiffs against each and any defendant

20 j. For an order awarding such other and further relief as this Court may
21 deem just and proper, and;

22 k. For an order of Injunctive Relief under the ADA to halt the unlawful
23 conduct so stated herein.

24 25 **CERTIFICATION OF INTERESTED ENTITIES TO PERSONS**

26
27 Pursuant to Civil L.R. 3-16, the undersigned attorney certifies that as of this
28 date, other than the named parties, there is no such interest to report

DEMAND FOR JURY TRIAL

Plaintiffs hereby demand a trial by jury on all causes of action so triable. Plaintiffs an their class also hereby demand a jury pursuant to the Federal Arbitration Act, 9 U.S.C. § 2 et seq. for those issues regarding arbitration that involve material issues of fact.

Respectfully submitted,

Dated: January 21, 2014

A handwritten signature in blue ink, appearing to read "Garrett Skelly", followed by a horizontal line.

Garrett Skelly
Attorney for Reginald Burgess, William
Everden and the named class members.